

2009

Tony-Alexander Hamilton v. A. Chuck Bigelow : Brief of Petitioner

Utah Court of Appeals

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Tony--Alexander: Hamilton; Petitioner.

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IN THE COURT OF APPEALS
OF THE Utah-STATE

Tony-Alexander: Hamilton.

PETITIONER/APPELLANT

VS.

A. (Chuck) Bigelow; (WARDEN)

AT THE PRISON IN GUNNISON,

OF THE Utah-STATE

RESPONDENT/APPELLEE

INCORPORATION CASE NUMBERS

APPELLATE # 20090300 CA

ORIGINAL # 20080745-S.C.

D.C. # 070500076

BRIEF OF THE PETITIONER/APPELLANT

Tony-Alexander: Hamilton.

AN APPEAL FROM THE COURT IN DISTRICT V FOR THE COUNTY

OF BEAVER, "ORDER OF DISMISSED" OF A WRIT OF HEBEAS CORPUS BY

THE JUDGE, G. Michael Westfall.

ORAL ARGUMENT REQUESTED

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FILED
UTAH APPELLATE COURTS

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(1) Commonwealth V. Moreiva 388 MASS.600, 447 N.E.2d 1224, 1228 (1983).....9

“A person may not use force to resist an illegal arrest unless the officer uses excessive force”.

(2) Elson V. State, 659 p. 2d at 1200 N. 18; Elson V. State, 659 p. 2d 1195

(Alaska 1983).....9

“The rule adapted barring the use of force to appose a search (arrest) does not apply where the officer uses excessive or unnecessary force in conducting the search (arrest)”
1195 "combines or extends arrests and/to searches".

(3) Gray V. State, 463 p. 2d 897, 908 (Alaska 1970).....9

“Excessive or unnecessary force in conducting a search (arrest)”.

“In instances where the officer uses excessive force in effecting a search (arrest), the defendant must have the legal right to defend against that excessive force”.

(4) Miranda V. Arizona 384 U.S. 491.....10,11,18,19

“Where rights secured by the constitution are involved, there can be no rule-making or legislation which would abrogate the right”.

(5) State V. Gardiner No. 880557 (Utah ct. app. 1989)..... 17,18

“The Court of Appeals held that one may not resist a search (arrest) by an officer, even if illegal, unless [the] defendant can show that the officer was not ... acting pursuant to his [or her] authority, or had used excessive force”.

(6) State V. Hay 859 p. 2d 1.7 (Utah 1993)..... 15,17

“[T]he prosecution’s responsibility is that of a minister of justice and not simply that of an advocate; which includes a duty to see that the defendant is accorded procedural justice and not that guilt is decided upon the basis of sufficient evidence. A criminal trial is more than a contest between the prosecution and the defense; it is a search for truth”.

(7) Margulies V. Upchurch 696 p. 2d 1195 (Utah 1985)..... 16, 22

(8) John Bad Elk V. U.S.177, 529 9, 19

“For an officer, being-killed in the course of a disorder, accompanying an arrest met with resistance, the law looks with different eyes upon the transaction, of an officer with the authority of making the arrest, than for an officer without the authority; in the former, the result could be murder, but, in the latter, could be nothing but manslaughter, or the facts could show the non-commitment of an offence”.

(9) State V. Nickles 728 p. 2d 123.131 (Utah 1986) 14,17

“It is clear that a prosecutor should be disqualified on a timely motion when he has a personal conflicting interest in the case”.

(10) Plummer V. State 136 Ind. 306 9, 19

“In the course of a without law-arrest, an individual may resist up-to and including the taking of the life of an officer attempting the arrest”.

(11) Runyon V. State 57 Ind. 80.....9, 19

“For an individual, without fault, in a place the individual has a right of being, is assaulted with threats and violence, the individual can, without a retreat, repel by force, and, if in the reasonable exercise of the inalienable right of self defense, the assailant is killed, the individual is justified. The principles above apply in the case of a peace-officer, in making an attempted arrest, and, abuses the authority, and transcends the bounds of, by the use of [unnecessary-deadly] force and violence, as with an individual-citizen in use of the [unnecessary-deadly] force and violence”.

(12) United – States V. Musser 7 p. 389 15

BRIEF

III-STATEMENT OF JURISDICTION

JUDICIAL CODE

UNDER THE UTAH CODE ANNOTATED § 78-2a-3(2) (F) THE COURT OF APPEALS HAS JURISDICTION OVER AN APPEAL FROM THE DISTRICT COURT, ON AN ORDER OF DISMISSAL OF A WRIT OF HABEAS CORPUS.

IV-STATEMENT OF ISSUES FOR REVIEW

(A) ON THE 9TH SEPTEMBER 1999, ON PRIVATE PROPERTY 60 PLUS MILES FROM A TOWN, WITHOUT A WARRANT, WITHOUT THE AUTHORITY, WITHOUT JURISDICTION, THE PETITIONER/APPELLANT WAS SHOT AT WHILE IN A PICKUP TRUCK, HAD A POLICE ATTACK DOG TURNED LOOSE ON, WITH A THREAT UPON THE LIFE OF THE PETITIONER/APPELLANT, AND WITHOUT DELAY THE SHOW OF [DEAD[LY]] FORCE IN CARRYING OUT THE THREAT, BY THE DEPUTY John Chambers, OF THE DEPARTMENT OF THE SHERIFF OF THE COUNTY OF BEAVER, Utah-STATE.

(B) AT THE TRIAL THE PETITIONER/APPELLANT WAS DEPRIVED OF THE CONSTITUTIONAL RIGHT OF CLAIMING SELF-DEFENSE AS A DEFENCE, BY THE JUDGE, Kay L. McIff.

(C) AT THE TRIAL THE PETITIONER/APPELLANT SUFFERED THE LOSS OF FREEDOM, REPUTATION AND THE AMERICAN WAY OF LIFE, BY THE UNTRUTHS THAT WAS IN THE TESTIMONY OF THE ASSAILANT OFFICER OF THE PEACE, John Chambers, THE SHERIFF Kenneth Yardley, AND RELIED UPON

IN THE DECISION MADE ON THE DIRECT APPEAL, CASE # 200000465-SC, BY THE SUPREME COURT OF THE STATE.

(D) THE PETITIONER/APPELLANT WAS WITHOUT A TRIAL IN FAIRNESS, CASE # 991500129, BECAUSE THE JUDGE Kay L. McIff, AND THE SPECIAL PROSECUTOR, Scott Burns, WERE RESPONDENTS IN A CIVIL CASE # 2000-CV-001 ST., FOR THE TITLE 18 U.S.C. § 4, “MISPRISION OF FELONY”, FOR THE KNOWLEDGE OF THE ATTEMPTED MURDER OF THE PETITIONER/APPELLANT BY THE ASSAILANT OFFICER OF THE PEACE , John Chambers, AND THE LACK OF RESPONSE AFTER THE PRELIMINARY HEARING (EXHIBIT (A)); FILED IN THE FEDERAL DISTRICT COURT ON THE 3RD DAY OF JANUARY, 2000, BY THE PETITIONER/ APPELLANT.

V-CONSTITUTIONAL PROVISIONS AND STATUTES OF THE STATE,
WHOSE INTERPRETATION IS DETERMINATIVE OF THE APPEAL.

PROVISIONS OF THE CONSTITUTION FOR THE United-STATES

ARTICLE VI CLAUSE 2

This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Bill of Rights, AMENDMENT 4

Search and Arrest Warrants

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized”.

Bill of Rights, AMENDMENT 6

Rights of an Accused Person

“In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense”.

CONSTITUTION OF THE Utah-STATE

ARTICLE 1 SECTION 1

ALL MEN HAVE THE INHERENT AND INALIENABLE RIGHT TO ENJOY AND
DEFEND THEIR LIVES AND LIBERTIES:...”.

ARTICLE 1 SECTION 14

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized”.

APPLICABLE STATUTES:

UTAH CODE ANN. § 76-2-402. Force in defense of person – Forcible felony defined.

(1) A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force. However, that person is justified in using force intended or likely to cause death or serious bodily injury only if he or she reasonably believes that force is necessary to prevent death or serious bodily injury to himself or a third person as a result of the other's imminent use of unlawful force, or to prevent the commission of a forcible felony.

(2) A person is not justified in using force under the circumstances specified in Subsection (1) if he or she:

* * * *

(b) is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or

* * * *

(5) In determining imminence or reasonableness under Subsection (1), the trier of fact may consider, but is not limited to, any of the following factors:

(a) the nature of the danger;

(b) the immediacy of the danger;

(c) the probability that the unlawful force would result in death or serious bodily injury[.]

UTAH CODE ANN. § 76-2-403 Force in arrest.

Any person is justified in using any force, except deadly force, which he reasonably believes to be necessary to effect an arrest or to defend himself or another from bodily harm while making an arrest.

UTAH CODE ANN. § 76-2-404 Peace officer's use of deadly force:

(1) A peace officer, or any person acting by his command in his aid and assistance, is justified in using deadly force when:

(a) the officer is acting in obedience to an in accordance with the judgment of a competent court in executing a penalty of death;

(b) effecting an arrest or preventing an escape from custody following an arrest, where the officer reasonably believes that deadly force is necessary to prevent the arrest from being defeated by escape; and

(i) the officer has probable cause to believe that the suspect has committed a felony offense involving the infliction of death or serious bodily injury; or

(ii) the officer has probable cause to believe that the suspect poses a threat of death or serious bodily injury to the officer or to others if apprehension is delayed;

(c) the officer reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury to the officer or another person.

(2) If feasible, a verbal warning should be given by the officer prior to any use of deadly force under Subsection (1)(b) or (1)(c).

UTAH CODE ANN. § 76-5-102 Assault

(1) Assault is:

(a) an attempt, with unlawful force or violence, to do bodily injury to another;

(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

(c) an act, committed with unlawful force or violence, that causes or creates a substantial risk of bodily injury to another.

(2) Assault is a class B misdemeanor.

(3) Assault is a class A misdemeanor if the person causes substantial bodily injury to another.

(4) It is not a defense against assault, that the accused caused serious bodily injury to another.

UTAH CODE ANN. § 76-5-103. Aggravated Assault.

(1) A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he:

(a) intentionally causes serious bodily injury to another; or

(b) under circumstances not amounting to a violation of Subsection (1)(a), uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury.

(2) A violation of Subsection (1) (a) is a second degree felony.

(3) A violation of Subsection (1) (b) is a third degree felony.

UTAH CODE ANN. § 77-7-7 Force in making arrest:

If a person is being arrested and flees or forcibly resists after being informed of the intention to make the arrest, the person arresting may use reasonable force to effect an arrest. Deadly force may be used only as provided in Section 76-2-404.

UTAH CODE ANN. § 77-7-15

Authority of peace officer to stop and question suspect – Grounds:

A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

VI-FACTS OF THE CASE

ON THE 1ST APRIL, 2000, THE PETITIONER/APPELLANT, Tony–Alexander:

Hamilton., CASE #991500129 WAS FOUND GUILTY OF ATTEMPTED

AGGRAVATED MURDER, A 1ST DEGREE FELONY, AGGRAVATED ASSAULT, A

3RD DEGREE FELONY, MURDER OF A SERVICE DOG, A CLASS A

MISDEMEANOR, INTERFERENCE WITH AN ARRESTING OFFICER, A CLASS B MISDEMEANOR, AND CRIMINAL TRESSPASS, A CLASS C MISDEMEANOR, BY A 6TH DISTRICT JUDGE, Kay L. McIff, IN THE 6TH DISTRICT CITY OF RICHFIELD, FOR THE 5TH DISTRICT, COUNTY OF BEAVER, OF THE UTAH – STATE. [THE CHANGE OF VENUE WAS FOR THE CONVENIENCE OF THE STATE IN OBTAINING A VERDICT OF GUILTY BY THE JURY.]

WITH THE TRIAL BEING THE AFTERMATH OF A CONTESTED PARCEL OF THE EARTH, SECTION 16, TOWNSHIP 28 SOUTH, RANGE 18 WEST, SALT – LAKE – BASE AND MERIDIAN, KNOWN AS VANCE SPRING, THAT ISSUE WILL NOT BE PART OF THIS CASE.

VII-ARGUEMENT

ISSUE (A)

ON THE 9 SEPTEMBER, 1999, ON PRIVATE PROPERTY, WITHOUT A WARRANT, WITHOUT AUTHORITY, UTAH CODE ANNOTATION § 77-7-15; THE OFFICER HAS AUTHORITY IN A “PUBLIC PLACE,” BUT IS WITHOUT AUTHORITY, ON PRIVATE PROPERTY WITHOUT A WARRANT, “SUPPORTED BY OATH OR AFFIRMATION”; Bill of Rights AMENDMENT 4 CONSTITUTION FOR THE United-STATES, UTAH-STATE CONSTITUTION ARTICLE 1 SECTION 1 AND 14.

ON THE DATE ABOVE THE SHERIFF AND THREE DEPUTIES, WITHOUT A WARRANT, ENTERED UPON THE ABOVE DESCRIBED PROPERTY. THE SHERIFF AND TWO DEPUTIES ENTERED ON THE EAST SIDE AND WALKED IN.

UPON SEEING THE THREE OFFICERS OF THE PEACE WHILE DRIVING A PICKUP, THE PETITIONER/APPELLANT STOPPED AND TURNED TOWARD THE OFFICERS, WHEN ONE OF THE OFFICERS DARTED INTO THE TREES. NOT WANTING A PART IN AN AMBUSH, THE PETITIONER/APPELLANT TURNED AROUND AND DROVE INTO A CLEARED AREA AND PROCEEDED IN DIGGING SOME WEEDS. AFTER 5 – 10 MINUTES, THE PETITIONER/APPELLANT NOTICED A FOURTH OFFICER WITH A DOG ON A LEASH WALKING TOWARD THE PETITIONER/APPELLANT, WHO STOPPED DIGGING WEEDS AND DROVE WITHIN 15 – 20 FEET OF THE OFFICER OF THE PEACE (ADDENDUM 0001) WITH A DOG ON A LEASH, AND ASKED, “DO YOU HAVE A WARRANT, John?”

AT THAT TIME THE OFFICER STARTED TOWARD THE TRUCK WITH A HAND ON A WEAPON AND A DOG JUMPING AT A LEASH. WITHOUT A DESIRE FOR A CONFRONTATION WITH AN OFFICER OF THE PEACE WITH HIS HAND ON A WEAPON AND A DOG JUMPING AT A LEASH, THE PETITIONER/APPELLANT PUSHED ON THE THROTTLE AND SPED IN A NORTH-WEST DIRECTION, 180° AWAY FROM THE ROCK HOUSE, (PAGE 191 OF EXHIBIT “A” LINE 12 THROUGH 15).

WITHIN TWO SECONDS THE OFFICER OF THE PEACE TURNED INTO AN ASSAILANT, SHOOTING AT THE TRUCK, WITH THE PETITIONER/APPELLANT INSIDE OF THE TRUCK, IN VIOLATION OF UTAH CODE ANNOTATED § 76-2-403, § 76-2-404.

AFTER THE OFFICER OF THE PEACE (ASSAILANT) HAD FIRED THE 5TH OR 6TH SHOT (0002), HITTING THE 2ND TIRE ON THE DRIVERS SIDE, THE PETITIONER/APPELLANT TURNED THE TRUCK IN A HALF CIRCLE, 180° AND DROVE BACK INTO THE AREA WHERE THE ASSAILANT OFFICER WAS FIRST SEEN, AND NOT WANTING THE WHEELS RUINED, STOPPED THE TRUCK. UPON EXITING THE TRUCK TO ASSESS THE DAMAGES, OBSERVED THE ASSAILANT OFFICER TAKING THE LEASH OFF OF THE DOG. WITHOUT A DESIRE OF BEING CHEWED ON BY A POLICE ATTACK DOG, FOR PROTECTION OF SELF (CONSTITUTION FOR THE United-STATES, Bill of Rights AMENDMENT 4, Utah-STATE CONSTITUTION, ARTICLE 1 SECTION 1, ARTICLE 1 SECTION 14), TOOK A .223 RIFLE FROM THE TRUCK. IN OBSERVING THE DOG, THE DOG RAN INTO THE POND OF WATER AND GOT A DRINK. UPON EXITING THE POND THE DOG WAS YELLED AT BY THE ASSAILANT OFFICER. WITHOUT ANY TRUST IN THE OFFICER OF THE PEACE, AFTER BEING SHOT AT IN THE TRUCK, TWO ROUNDS WERE FIRED AT THE DOG, MISSING ON THE FIRST SHOT. AFTER THE SECOND SHOT THE DOG ROLLED OVER ONCE OR TWICE AND LAY ON THE GROUND.

AT THAT TIME THE ASSAILANT OFFICER YELLED AND SAID, “YOU MOTHER FUCKER, YOU KILLED MY DOG, YOU’RE A DEAD MAN, Tony.” (PAGE 162, EXHIBIT A OF THE WRIT.) WITHIN A SECOND A BARRAGE OF BULLETS STARTED HITTING THE TRUCK, FORCING THE PETITIONER/APPELLANT INTO TAKING COVER BEHIND THE FRONT WHEEL

OF THE PICKUP. AFTER THE 5TH OR 6TH ROUND, THE DEPUTY WAS OBSERVED PUTTING A SECOND CLIP INTO THE WEAPON, AND THAT CLIP WAS EMPTIED. THE THIRD CLIP WAS PUT INTO THE WEAPON AND THE ASSAILANT OFFICER STARTED WALKING TOWARD THE AREA WHERE THE DOG HAD FALLEN, AND HAD THE ASSAILANT OFFICER REACHED THE AREA, THE PETITIONER/APPELLANT WOULD HAVE BEEN WITHOUT ANY PROTECTION FROM THE ASSAULT. (UTAH CODE ANNOTATED § 76-5-102 AND § 76-5-103.

AT THAT TIME THE PETITIONER/APPELLANT WAS WITHOUT A TRUST IN THE OFFICERS OF THE PEACE, AND CONSIDERING THE EVENT A SECOND “RUBY RIDGE” (IN THE Idaho – STATE), OR A SECOND “WACO” (IN THE Texas – STATE), AND WITHOUT A KNOWLEDGE OF THE LOCATION OF THE THREE OFFICERS OF THE PEACE SEEN BEFORE, TWO SHOTS WERE FIRED IN FRONT OF THE ASSAILANT OFFICER, AND SOME WORDS WERE YELLED BY THE ASSAILANT. WITH THE FORWARD MOTION OF THE ASSAILANT TOWARD THE AREA THAT THE DOG HAD FALLEN, IN THE FEAR FOR THE LIFE, THE LEG OF THE ASSAILANT WAS PICKED OUT AND SHOT, BY THE PETITIONER/APPELLANT. Commonwealth V. Moreiva 388 MASS.600, 447 N.E.2d 1224, 1228 (1983), Elson V. State, 659 p. 2d at 1200 N. 18; Elson V. State, 659 p. 2d 1195, Gray V. State, 463 p. 2d 897, 908 (Alaska 1970), John Bad Elk V. U.S.177, 529, Plummer V. State 136 Ind. 306, Runyon V. State 57 Ind. 80.

IN THE MIND OF THE PETITIONER/APPELLANT, AFTER BEING SHOT AT 20 PLUS TIMES (TWO ELEVEN ROUND CLIPS), AFTER SHOOTING THE DOG AND THE ASSAILANT OFFICER IN DEFENSE OF SELF (CONSTITUTION FOR THE United-STATES Bill of Rights AMENDMENT 4, CONSTITUTION FOR THE Utah-STATE ARTICLE 1 SECTION 1, ARTICLE 1 SECTION 14), Miranda V. Arizona 384 U.S. 491, AND EXPECTING THE THREE OFFICERS SEEN BEFORE [TO] RETALIATE, THE PETITIONER/APPELLANT LOCATED TWO MORE CLIPS OF AMMUNITION IN THE TOOL BOX ON THE TRUCK, AND STARTED WALKING OUT OF THE AREA.

WITHIN A COUPLE OF MINUTES THE SHERIFF, Ken Yardley CAME WALKING OUT OF THE TREES AND YELLED, "IS THAT YOU, Tony?" THE ANSWER WAS, "YES Ken, DO YOU HAVE A WARRANT?" THE ANSWER WAS, "NO." THE NEXT WORD FROM THE PETITIONER/APPELLANT WAS, "THAT HAS BEEN THE PROBLEM ALL ALONG. WHY DO YOU INSIST ON VIOLATING THE LAW?"

IN THE PROCESS OF THE CONVERSATION, WITHOUT A TRUST IN THE LAW ENFORCEMENT, TWICE THE SHERIFF BEGIN CLOSING THE DISTANCE BETWEEN THE SHERIFF AND THE PETITIONER/APPELLANT (PROBLEM OF HEARING), AND TWICE, WITHOUT A TRUST IN LAW ENFORCEMENT AFTER BEING SHOT AT 20 PLUS TIMES BY THE ASSAILANT OFFICER OF THE PEACE, WITH THE RIFLE LEANED OVER THE FENCE, POINTING IN THE AIR ABOVE THE SHERIFF, (EXHIBIT "A", PAGE 130, LINE 22 THRU LINE 16 PAGE 131), THE

SHERIFF WAS TOLD “THAT’S CLOSE ENOUGH,” BY THE PETITIONER/APPELLANT.

AFTER 10 – 15 MINUTES CONVERSING WITH THE SHERIFF, THE DEPUTY, James White, WITH THE HANDS IN THE AIR, STARTED WALKING OUT OF THE TREES AND JOINED IN THE CONVERSATION. IN THE COURSE OF THE CONVERSATION THE SHERIFF WAS TOLD, “YOU HAD BETTER GO TO TOWN, CONVENE A GRAND JURY AND COME BACK WITH A WARRANT.”

WITHIN HALF AN HOUR THE PETITIONER/APPELLANT WAS SUBDUED AND ARRESTED BY THE SHERIFF, Ken Yardley AND THE DEPUTY James white.

ISSUE (B)

AT THE TRIAL, PRESIDED OVER BY THE JUDGE Kay L. McIff, THE COURT DID DEPRIVE THE PETITIONER/APPELLANT THE RIGHT OF CLAIMING SELF-DEFENSE AS A DEFENCE, AGAINST THE THREAT OF LIFE AND THE USE OF DEAD[LY] FORCE IN CARRYING OUT THE THREAT. [WRIT OF HABEAS CORPUS, EXHIBIT “C” PAGE 2, ARTICLE 1, SECOND PARAGRAPH], [A RULING, PROBABLY MADE THE FIRST HOUR, IN THE JUDGE’S CHAMBERS.]

IN THE CONSTITUTION OF THE UNITED STATES, Bill of Rights AMENDMENT 4, AND Bill of Rights AMENDMENT 6, ALONG WITH THE CONSTITUTION FOR THE Utah-STATE; ARTICLE 1 SECTION 1, AND ARTICLE 1 SECTION 14, THE GOD GIVEN RIGHTS INHERENT AND INALIENABLE ARE GUARANTEED BY BOTH CONSTITUTIONS. MIRANDA V. ARIZONA 384 US 419; “WHERE THE RIGHTS SECURED BY THE CONSTITUTION ARE INVOLVED,

THERE CAN BE NO RULE MAKING OR LEGISLATION WHICH WOULD ABROGATE THE RIGHT”.

ISSUE (C)

AT THE TRIAL THE PETITIONER/APPELLANT SUFFERED THE LOSE OF FREEDOM, REPUTATION AND THE AMERICAN WAY OF LIFE, BY THE UNTRUTHS THAT WERE PUT ON THE RECORD, BY THE ASSAILANT OFFICER OF THE PEACE, DEPUTY John Chambers AND THE SHERIFF Kenneth Yardley, AND RELIED UPON IN THE DIRECT APPEAL, CASE #200000465 – SC (EXHIBIT “D” OF THE WRIT), BY THE SUPREME COURT OF THE STATE.

ON PAGE 185 OF THE (EXHIBIT “A”), LINE 8, QUOTE, “Tony DROVE UP TO WITHIN ABOUT EIGHT FEET OF ME....” LINE 14, SAID, “THAT’S FAR ENOUGH CHAMBERS,”.... LINE 23, “THEN CONTINUED TO DRIVE PAST ME.”

IN THE ADDENDUM (0001), AN ACCOUNT GIVEN BY THE DEPUTY John Chambers TEN DAYS AFTER THE INCIDENT, “THE PICKUP GOT WITHIN 15-20 FT. OF HIM”,... “TONY STATED, THAT’S FAR ENOUGH CHAMBERS, THEN SPED UP AND TURNED AROUND”.

IN REALITY, THE FACT IS ESTABLISHED THAT THE TRUCK IS PAST THE ASSAILANT, DEPUTY, John Chambers, AND THE ACCOUNT GIVEN, LINE 21 PAGE 187 OF EXHIBIT “A”, THRU LINE 8 PAGE 189, IS AN IMPOSSIBILITY.

IN THE ACCOUNT GIVEN, (0001), 4TH PARAGRAPH, QUOTE, “Chambers STATED AS HE WAS MOVING TOWARD Tony AND THE PICKUP, THERE WERE TWO OR THREE SHOTS FIRED IN HIS DIRECTION BY Tony, THAT HE SAW

DUST HIT BEHIND HIM AND TO HIS RIGHT.” IF A MAN WAS SHOOTING AT YOU, WOULD YOU NOT BE LOOKING TOWARD THE SHOOTER, INSTEAD OF BEHIND YOU, WHILE MOVING TOWARD THE SHOOTER?

ON PAGE 194 OF (EXHIBIT “A”), LINE 2, THE DEPUTY CHANGED THE SEQUENCE OF THE SHOOTING: “IMMEDIATELY AFTER HE HIT MAX, HE FIRED TWO ROUNDS AT ME.”

ON THE PAGE 162 OF THE (EXHIBIT “A”), LINE 3 THRU 16 GIVES AN ACCURATE ACCOUNT OF THE SEQUENCE OF THE SHOOTING, (EXHIBIT “B” OF THE WRIT) BY THE WITNESS, Raymond Goodwin.

ON PAGE 195 OF (EXHIBIT “A”, LINE 12 THRU LINE 18) THE ASSAILANT DEPUTY CALLED THE DOG BACK TO HIS LOCATION, SHOT THE DOG IN THE HEAD AND PUT HIM DOWN. IN THE (0004) EXHIBIT, THE NECROPSY IS WITHOUT A MENTION OF THE SHOT [TO] EUTHANIZE THE DOG.

IN THE ACCOUNT GIVEN AT THE BOTTOM OF THE PAGE 187 OF (EXHIBIT “A”), AND THE TOP OF PAGE 188, THE ASSAILANT DEPUTY FIRED 3 ROUNDS AT THE TIRES. ON THE PAGE (0003), THE ACCOUNT WAS “AT LEAST FOUR.” ON THE PAGE (0002), “WHEN WE HEARD PROBABLY FOUR TO FIVE SHOTS AND THEN I HEARD JOHN, DEP. CHAMBERS ADVISE, THAT HE HAD SHOT TWO TIRES OUT.”

ON THE DIRECT APPEAL (EXHIBIT “D”), OF THE WRIT, PAGE 6, #15, THE SHERIFF STATED THAT THE PETITIONER/APPEALLANT HAD THE RIFLE POINTED AT HIM. HOWEVER, ON PAGE 130 OF (EXHIBIT “A”) OF THE WRIT,

LINE 20 -23, THE RIFLE WAS HELD AT THE WAIST, ALSO ON PAGE 131 LINE 2 THROUGH 16, THE TESTIMONY OF THE SHERIFF IS REFUTED BY THE DEPUTY JAMES WHITE, WHO OBSERVED THE INCIDENT. (IS THE TESTIMONY OF THE SHERIFF BEYOND REASONABLE DOUBT?)

AT THE TRIAL, THE STATE PRESENTED AS EVIDENCE, 5 EMPTY CASSINGS OF THE .225 CALIBER RIFLE, AND 14 EMPTY CASSINGS OF THE .40 CALIBER WEAPON THAT WERE FOUND. ALSO FOUND WERE TWO EMPTY CLIPS THAT HOLD 11 ROUNDS EACH, ON THE PERSON OF THE ASSAILANT [OFFICER OF THE PEACE].

ISSUE (D)

THE PETITIONER/APPELLANT WAS WITHOUT A TRIAL IN FAIRNESS, CASE #991500129, BECAUSE THE JUDGE Kay L. McIff, AND THE SPECIAL PROSECUTOR, Scott Burns, WERE RESPONDENTS IN A CIVIL CASE, CASE #2000-CV-001 ST., FOR THE TITLE 18 U.S.C. § 4 “MISPRISION OF FELONY,” FOR THE KNOWLEDGE OF THE ATTEMPTED MURDER OF THE PETITIONER/APPELLANT, BY THE ASSAILANT OFFICE OF THE PEACE, John Chambers, AND THE LACK OF RESPONSE AFTER THE PRELIMINARY HEARING (EXHIBIT “A”), FILED IN THE FEDERAL DISTRICT COURT ON THE 3RD DAY OF January, 2000, BY THE PETITIONER/APPELLANT.

STATE V. Nickles 728 P. 2d 123. 131 (Utah 1986)

“IT IS CLEAR THAT A PROSECUTOR SHOULD BE DISQUALIFIED ON A TIMELY MOTION WHEN HE HAS A PERSONAL CONFLICTING INTEREST IN THE CASE”, SEE (0005) AND (0006).

State V. Hay 859 p. 2d 1.7 (Utah 1993)

“[T]he prosecution’s responsibility is that of a minister of justice and not simply that of an advocate; which includes a duty to see that the defendant is accorded procedural justice and not that guilt is decided upon the basis of sufficient evidence. A criminal trial is more than a contest between the prosecution and the defense; it is a search for truth”.

IN THE CASE, United – STATES V. MUSSER, 7P. 389, THE DISSENTING OPINION OF JUSTICE POWERS GAVE THE DESCRIPTION OF THE ROLE OF A PROSECUTOR, QUOTE:

“A PROSECUTING ATTORNEY IS NOT A PLAINTIFF’S ATTORNEY, BUT A SWORN MINISTER OF JUSTICE, AS MUCH BOUND TO PROTECT THE INNOCENT AS TO PURSUE THE GUILTY: WELLER V. PEOPLE 30 MICH. 16.

“HIS POSITION IS ONE INVOLVING A DUTY OF IMPARTIALITY, NOT ALTOGETHER UNLIKE THE JUDGE HIMSELF. THE POSITION IS A TRYING ONE, BUT THE DUTY, HOWEVER, EXISTS: MEISTER V. PEOPLE. 31 MICH. 99.

“HE REPRESENTS THE PUBLIC INTERESTS, WHICH CAN NEVER BE PROMOTED BY THE CONVICTION OF THE INNOCENT. HIS OBJECT, LIKE THAT OF THE COURT, SHOULD BE SIMPLE JUSTICE, AND HE HAS NO RIGHT TO SACRIFICE THESE TO ANY PRIDE OF PROFESSIONAL SUCCESS, AND HOWEVER STRONG MAY BE HIS BELIEF IN THE PRISONER’S GUILT, HE MUST REMEMBER THAT THOUGH UNFAIR MEANS MAY HAPPEN TO RESULT IN DOING JUSTICE TO THE PRISONER IN A PARTICULAR CASE, YET JUSTICE SO ATTAINED IS UNJUST AND DANGEROUS TO THE WHOLE COMMUNITY; HURD V. PEOPLE, 25 MICH. 405”.

AT THE TRIAL, THE INTEREST OF THE Utah – STATE MUST HAVE OUTWEIGHED THE NEED TO PROTECT THE INTEGRITY OF THE SYSTEM OF JUSTICE, HAVING THE PROSECUTOR CONTINUE WITH THE CASE AFTER THE PRE-TRIAL MOTIONS. IN THE ADDENDUM (0005), AND (0006) WAS

SUBMITTED INTO THE COURT BY THE ATTORNEY FOR THE
PETITIONER/APPELLANT, Edward K. Brass. MARGULIES V. UPCHURCH. 696 P.
2D 1195 (Utah 1985).

“MOTIONS TO DISQUALIFY OPPOSING COUNSEL PRESENT THE COURT WITH TWO IMPORTANT BUT OFTEN OPPOSING POLICY CONSIDERATIONS; ON THE ONE HAND, THE UNDESIRABILITY OF SEPARATING LITIGANTS FROM THE COUNSEL OF THEIR CHOICE AND, ON THE OTHER, THE NECESSITY OF ENSURING THAT LITIGANTS AND THE PUBLIC PERCEIVE LAWYERS AND COURTS AS POSSESSING THE INTEGRITY NECESSARY FOR THE DISPOSITION OF JUSTICE. WE ARE ESPECIALLY MINDFUL OF THE LATTER CONSIDERATIONS, AS THIS COURT IS CHARGED BY LAW WITH APPROVING THE ADMINISTERING RULES OF CONDUCT AND DISCIPLINE GOVERNING THE PRACTICE OF LAW IN THE STATE OF Utah. U.C.A. 1953, §§ 78-51-14-19 (1977).

AMONG THE GUIDELINES FOR PROFESSIONAL CONDUCT WHICH WE HAVE APPROVED IS CANON 9 WHICH STATES: “a LAWYER SHOULD AVOID EVEN THE APPEARANCE OF PROFESSIONAL IMPROPRIETY”. THE BASIS OF THIS TENET IS THAT SOCIETY’S PERCEPTION OF THE INTEGRITY OF OUR LEGAL SYSTEM MAY BE AS IMPORTANT AS THE REALITY SINCE IT IS THE PERCEPTION THAT ENGENDERS PUBLIC CONFIDENCE THAT JUSTICE WILL BE DISPENSED...”

“THE PRACTICE OF LAW IS A PROFESSION WHOSE MEMBERS ARE GRANTED A SPECIAL PRIVILEGE OF HOLDING THEMSELVES OUT AS HAVING THE EDUCATION, THE SKILLS AND THE INTEGRITY TO GIVE HELP AND GUIDANCE TO OTHERS IN THEIR AFFAIRS.... THIS INCLUDES THAT THE ATTORNEY WILL BECOME UNRESERVEDLY IDENTIFIED WITH HIS CLIENT’S INTERESTS AND PROTECT HIS RIGHTS. IT MEANS NOT ONLY IN DEALING WITH THE CLIENT’S ADVERSARY, BUT ALSO THAT THE ATTORNEY WILL ADHERE TO THE IDEALS OF HONESTY AND FIDELITY WITH THE CLIENT HIMSELF; AND THAT HE WILL NOT USE HIS POSITION TO TAKE ANY UNFAIR ADVANTAGE OF THE SPECIAL CONFIDENCE WHICH THE CLIENT IS ENTITLED TO REPOSE IN HIM.”

ID. AT 1204 (CITATION OMITTED).

IN BLACKS LAW DICTIONARY, THE PHRASE “CONFLICT OF INTEREST’ IS
DEFINED AS:

“TERM USED IN CONNECTION WITH PUBLIC OFFICIALS AND FIDUCIARIES AND THEIR RELATIONSHIP TO MATTERS OF PRIVATE INTEREST OR GAIN TO THEM. ETHICAL PROBLEMS CONNECTED THEREWITH ARE COVERED BY STATUTES IN MOST JURISDICTIONS AND BY FEDERAL STATUTES ON THE FEDERAL LEVEL. GENERALLY WHEN USED TO SUGGEST DISQUALIFICATION OF A PUBLIC OFFICIAL FROM PERFORMING HIS SWORN DUTY, TERM “CONFLICT OF INTEREST” REFERS TO A CLASH BETWEEN PUBLIC INTEREST AND THE PRIVATE PECUNIARY INTEREST OF THE INDIVIDUAL CONCERNED.” GARDINER V. NASHVILLE HOUSING AUTHORITY OF METROPOLITAN GOVERNMENT OF TNASHVILLE AND DAVISON COUNTY, TENN., c.a. Tenn., 514 f. 2d 38, 41”. STATE V. NICKLES 728 P. 2D 123, 131 (UTAH 1986), STATE V. HAY. 859 P. 2D 1, 7 (UTAH 1993).

IN THE DISMISSAL OF THE WRIT OF HABEAS CARPUS IN THE LOWER COURT, THE JUDGE WROTE:

“... ANY ISSUE RAISED IN THIS PETITION, NOT ALREADY ADJUDICATED, COULD AND SHOULD HAVE BEEN RAISED OF DIRECT APPEAL.”

THE PETETIONER/APPELLANT WAS WITHOUT ANY CONTROL OVER THE CONTENTS OF THE DIRECT APPEAL, FOR THE ATTORNEY WAS APPOINTED BY THE COURT; AND THE SAME JUDGE THAT PRESIDED OVER THE TRIAL, AND DEPRIVED THE PETITIONER/APPELLANT OF THE CONTITUONAL RIGHT OF SELF DEFENCE AND A TRIAL IN FAIRNESS; RESIDED IN CEDAR CITY, AND THE ATTORNEY VISITED THE PETITIONER/APPELANT ONCE IN PRISON IN GUNNISON FOR A FEW MINUTES; BESIDES THE ATTORNEY HAD COPYS OF THE SAME COURT DOCUMENTS THAT ARE IN POSSESSION OF THE PETITIONER/APPELLANT, BUT NOT WITHSTANDING TRAINING AND SKILL AS AN ATTORNEY FAILED TO BRING

UP ISSUES PERTAINING TO THIS CASE. [WHICH BRINGS UP AN ISSUE, THAT WILL NOT BE A PART OF THIS CASE, THE INEFFECTIVE ASSISTANCE OF COUNSEL.]

ON THE 9TH DAY OF SEPTEMBER, 1999, IN A REMOTE WESTERN PORTION OF THE COUNTY OF BEAVER, 60 PLUS MILES FROM THE CLOSEST TOWN, THE SHERIFF AND THREE DEPUTIES, WITHOUT A WARRANT DROVE THAT DISTANCE FOR AN INVESTIGATION OF AN INFRACTION, OR AT THE MOST A MISDEMEANOR. UTAH CODE ANNOTATED § 76-6-206 (2) (A), (B), (3). WITH THE KNOWLEDGE FOR OVER A WEEK THAT THE TRIP WOULD BE MADE (EXHIBIT “A” PAGE 149, 150, AND 151). THERE WAS AMPLE TIME FOR OBEYING THE LAW (OBTAINING A WARRANT), (CONSTITUTION FOR THE United – STATES ARTICLE VI CLAUSE II, Bill of Rights AMENDMENT 4); (UTAH-STATE CONSTITUTION, ARTICLE 1 § 14), AND (MIRANDA V. ARIZONA 384 U.S. 491).

ON THE 9TH DAY OF SEPTEMBER, 1999, ON THE PRIVATE PROPERTY CALLED, “VANCE SPRING,” WITHOUT A WARRANT, AND WITHOUT THE AUTHORITY (UTAH CODE ANNOTATED § 77-7-15), BECAUSE, AT THE TIME THE ASSAILANT OFFICER OF THE PEACE WITHDREW THE WEAPON AND STARTED SHOOTING AT THE TRUCK, WITH THE PETITION/APPELLANT IN THE TRUCK, THE ASSAILANT OFFICER OF THE PEACE DID BECOME A CITIZEN WITH A GUN (Utah CODE ANNOTATED § 76-2-403, § 76-2-404), WITH THE USE OF THE DEAD[LY] FORCE. (STATE V GARDINER 814 P. 2D 568, FN3,

FN4.), (John Bad Elk V. U.S. 177, 529), Plummer V. STATE, 136 IND. 306), (Runyon V. STATE, 57 IND. 80). FOR THE ASSAILANT OFFICER OF THE PEACE DID COMMIT THE CRIME OF A “FORCIBLE FELONY” AS DEFINED IN Utah – CODE ANNOTATED § 76-2-402. FOR THE USE OF DEAD[LY] FORCE IS ALLOWED AS DEFINED IN Utah-CODE ANNOTATED § 77-7-7 AND § 76-2-404. BEYOND THE STATUTORY RESTRAINTS UPON THE USE OF FORCE, THE CONSTITUTION FOR THE PEOPLE OF THE United – STATES, AMENDMENT 4, AND THE CONSTITUTION FOR THE Utah – STATE, ARTICLE 1 SECTION 1, AND ARTICLE 1 SECTION 14 GUARANTEE THE PEOPLE THE INHERENT AND INALIENABLE RIGHT OF SELF – DEFENSE. (MIRANDA V. ARIZONA 384 US 491).

VIII-CONCLUSION

BY THE TESTIMONY OF THE FELLOW OFFICERS AND THE REPORT OF THE NECROPSY, THE UNTRUTHS TOLD BY THE ASSAILANT OFFICER OF THE PEACE AND BY THE SHERIFF ARE REFUTED AND WITHOUT CREDITABILITY. ON THAT DAY IN DRIVING AWAY FROM THE ASSAILANT, IN THE REAR VIEW MIRROR ON THE PICKUP, THE OFFICER WAS OBSERVED, SHOOTING WITH THE RIGHT HAND AND A DOG LUNGING AT THE LEASH HELD WITH THE LEFT HAND, BY THE PETITIONER/APPELLANT.

ON THE 27TH DAY OF MARCH, 2000, THE PETITIONER/APPELLANT MET THE PAID COUNSEL, Edward K. Brass IN THE COURT ROOM; AT THE HOUR OF 8:05 AM. AT THE HOUR OF 8:15 AM, THE PAID ATTORNEY WAS CALLED INTO THE CHAMBERS OF THE JUDGE, Kay L. McIff. AT THE HOUR OF 9:15 THE

PETITIONER/APPELLANT WAS CALLED INTO THE CHAMBERS. IN THE CHAMBERS, WITHOUT CONSULTING WITH THE PETITIONER/APPELLANT, THE MOTION FOR A SPECIAL PROSECUTOR WAS WITHDRAWN (PAGE 24 OF .0007), AND THE JUDGE REFUSED TO RECUSE HIMSELF (PAGE 25 OF .0007).

WITH THE MEETING IN CHAMBERS OVER ABOUT 9:30 AM, AND A TOTAL OF 40 PAGES OF TRANSCRIPT COVERING THE RECORDING OF THE EVENTS, THE FIRST 8 PAGES COVERED WITNESSES AND EXHIBITS, AND THE PETITIONER/APPELLANT ENTERING ON PAGE 16, AND THE NEXT 24 PAGES TAKING 15 MINUTES; WHAT HAPPENED FOR THE FIRST HOUR? FOR THE CASE WAS DISCUSSED; AS RECORDED ON PAGE 24, LINE 4 THROUGH LINE 8, (.0007); A COMMENT MADE BY THE JUDGE, Kay I. McIff. WITHOUT A RECORD OF THE DISCUSSION, AND THE PROCEEDINGS IN THE CHAMBERS, AND WITH THE JUDGE, Kay L. McIff, AND THE PROSECUTOR, Scott Burns AS CIVIL ADVERSARIES, THE PETITIONER/APPELLANT WAS WITHOUT A TRIAL IN FAIRNESS, BY THE Utah-STATE.

ON THE 9TH DAY OF SEPTEMBER, 1999, ON THE PRIVATE PROPERTY KNOWN AS VANCE SPRING, WITHOUT A WARRANT, THE ASSAILANT OFFICER OF PEACE, John Chambers, WAS WITHOUT THE AUTHORITY OF AN OFFICER, AND BY THE ACTIONS AND USE OF THE [UNNECESSARY DEADLY] FORCE USED IN THE INVESTIGATION OF A MISDEMEANOR, BECAME A CITIZIN WITH A GUN. FOR John Chambers DID THREATON AND DID USE DEADLY FORCE AGAINST THE LIFE OF THE PETETIONER/APPEALLENT,

BEFORE FORCE WAS USED TO STOP THE OFFICER OF THE PEACE, TURNED INTO A CITIZEN WITH A GUN..

AT THE TRIAL THE PETITIONER/APPELLANT WAS DAMAGED BECAUSE THE COURT DID DEPRIVE THE PETITIONER/APPELLANT OF THE INHERENT AND INALIENABLE RIGHT OF SELF-DEFENSE FOR A DEFENSE, BY THE JUDGE Kay L. McIff. EXHIBIT "C" OF THE WRIT, PAGE 2, PARAGRAPHS 1 AND 2, HAS NOTHING TO DO WITH THE JURY INSTRUCTIONS.

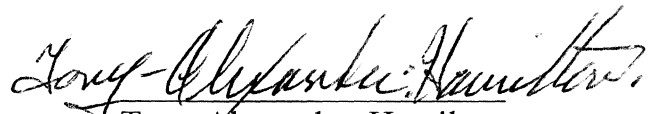
AT THE TRIAL THE PETITIONER/APPELLANT WAS DAMAGED BY THE UNTRUTHS PUT ON THE RECORD BY THE ASSAILANT OFFICER OF THE PEACE, John Chambers SHERIFF Kenneth Yardley AND RELIED UPON BY THE SUPREME COURT ON THE DIRECT APPEAL, CASE @200000465-SC, (EXHIBIT "D"), OF THE WRIT. (STATE V. Hamilton. 70p. 3d 111, 2003 ut 22).

WITH THE JUDGE, Kay L. McIff, AND THE SPECIAL PROSECUTOR Scott Burns, AS CIVIL ADVERSARIES, CASE# 2000-CV-0001 TS, FILED ON THE 3RD DAY OF JANUARY, 2000, CHARGING THE TWO OFFICERS OF THE COURT WITH TITLE 18 U.S.C. § 4, MISPRISION OF FELONY, FOR THE LACK OF RESPONSE AFTER THE PRELIMINARY HEARING, (EXHIBIT "A") OF THE WRIT, FOR THE OFFICERS OF THE COURT DID HAVE THE KNOWLEDGE OF THE ATTEMPT UPON THE LIFE OF THE PETITIONER/APPELLANT, BY THE ASSAILANT OFFICER OF THE PEACE, John Chambers.

AFTER THE “MOTION TO DISQUALIFY JUDGE, AND CERTIFICATE OF GOOD FAITH” WAS FILED IN THE COURT, (.0005), WITH THE “MOTION TO APPOINT SPECIAL PROSECUTOR, “AND” MEMORANDUM SUPPORTING MOTION TO APPOINT SPECIAL PROSECUTOR”, (.0006), THE DUTY OF THE JUDGE, Kay L. McIff SHOULD HAVE BEEN, NOTIFY THE CHIEF JUDGE FOR THE APPOINTMENT OF A SPECIAL PROSECUTOR, AND RECUSE HIMSELF FROM THE CASE; CODE OF ETHICS; Margulies V. Upchurch 696 P. 2d 1195 (Utah 1985).

FOR THE REASONS STATED ABOVE THIS COURT SHOULD REVERSE THE CONVICTIONS OF THE PETITIONER/APPELLANT, AND REMAND THE CASE BACK INTO THE TRIAL COURT FOR DISMISSAL.

ON THE 5th DAY OF July, 2009, SUBMITTED INTO THE COURT OF APPEALS WITH RESPECT, BY THE PETITIONER/APPELLANT.


Tony-Alexander: Hamilton.

Petitioner/appellant

CERTIFICATE OF MAILING

UNDER THE PENALTIES OF PERJURY THE CERTIFICATE FOLLOWING IS
SUBSCRIBED BY THE UNDERSIGNED.

ON THE 9TH DAY OF JULY, 2009, A TRUE AND CORRECT COPY OF THE
APPEAL BRIEF, CASE NUMBERED: APPELLATE #20090300 CA, ORIGINAL
#20080745-SC, D.C. #070500076, WAS MAILED, POSTAGE PREPAID, TO THE
FOLLOWING, BY THE UNDERSIGNED.



L. LARKIN HAMILTON

2 cc
Von J. Christiansen (ATTORNEY)
2160 SOUTH 600 WEST
P.O. BOX 471
BEAVER, Utah - STATE [84713]

A. (Chuck) Bigelow (WARDEN)
255 EAST 300 NORTH
GUNNISON, Utah - STATE [84634]

CC
J. Frederic Voros Jr.
ASSISTANT ATTORNEY GENERAL
160 EAST 300 SOUTH 6TH FLOOR
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SALT-LAKE-CITY, Utah - STATE [84114-0854]

CC
STEVE TURLEY (WARDEN)
Utah-STATE PRISON
P.O. BOX 250
DRAPER, Utah-STATE [84020]

IN THE COURT OF APPEALS OF THE Utah-STATE

Tony-Alexander: Hamilton.

PETITIONER/APPELLANT

VS.

A. (Chuck) Bigelow; (WARDEN)

AT THE PRISON IN GUNNISON

OF Utah-STATE

RESPONDENT/APPELLEE

INCORPORATION CASE

APPELLATE # 20090300 CA

ORIGINAL # 20080745-SC

D.C. # 070500076

ADDENDUM OF PETITIONER/APPELLANT

Tony-Alexander: Hamilton.

AN APPEAL FROM THE COURT IN DISTRICT V

FOR THE COUNTY OF BEAVER

THE DISMISSAL OF A WRIT OF HABEAS CORPUS

BY THE JUDGE G. Michael Westfall

ORAL ARGUMENT REQUESTED

Von J. Christiansen (ATTORNEY)
2160 South 600 West
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BEAVER, Utah-STATE [84713]

ATTORNEY FOR RESPONDENT/APPELLEE

Tony-Alexander: Hamilton.
C/O 30302, LONEPEAK A-214
P.O. BOX 250
DRAPER, Utah-STATE [84020]

PETITIONER/APPELLANT

FOLLOW-UP BY LT. JOHN KIMBALL:

On 09/19/99 at approximately 1600 hrs. Sheriff Phillips and I met with John Chambers at the Dixie Valley Medical Center in St. George. Present during this interview was Dixie Valley Medical Center security guard Michael Oliphant. Chambers stated when they arrived at the Vance Springs on 09/09/99 he went up on a hill east of the Vance Springs property to look for movement within the fenced area. He stated that radio communications were not very good at Vance Springs and he had a difficult time communicating. Chambers said he originally saw some dust as if a vehicle was driving within the compound and then saw a blue pickup driving toward the old rock house at the pond. He stated he was unable to get a response from the other officers on the radios so he drove around the west side when Sgt. Goodwin stated there was a blue Ford pickup going to that area. Chambers said he was about at the south gate when this information was relayed by Sgt. Goodwin. He advised Sgt. Goodwin stated it looked like the blue pickup was going to the north gate.

Chambers stated when he went to the north gate it was barricaded by a large trailer, that he exited his vehicle along with his K-9 and turned it loose. As he walked into the property he noticed the blue pickup parked by the pond facing east, east of the rock house. At first it appeared there were possibly two people either inside or on the south side of the blue pickup. Chambers said he thought it was Sgt. Goodwin talking with Tony Hamilton, but shortly after that it was apparent it was only one person as he saw Tony get in the pickup.

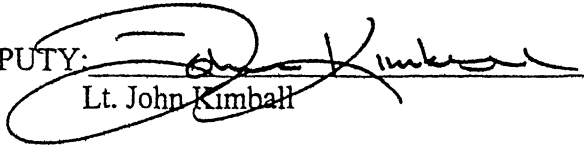
Chambers said he called Sgt. Goodwin on the radio and said the blue pickup and Tony were at the rock house. After Tony got in the pickup he started coming straight at him and he thought he was coming up to talk. When the pickup got to within 15-20 ft. of him, Tony placed his right hand over his left hand maintaining his left hand on the steering wheel. Chambers said in his opinion it was a clear indication that Tony wanted him to think he had a pistol in his hand or a firearm. Tony stated, "that's far enough Chambers", then sped up and turned around. Chambers advised he told Tony several times to "hold it, Tony, stop", stating "that's far enough Tony, stop". Chambers said he shot twice, maybe three times; once at the front tire and then once, possibly twice at the back tire to flatten it. He then told Sgt. Goodwin on the radio that he thought Tony was driving back to the cabin in the trees and he began jogging behind Tony's vehicle. Chambers said instead of driving into the trees where the residence were, Tony drove back down to the pond and the rock house, facing the pickup to the west.

Chambers stated as he was moving toward Tony and the pickup there were two or three shots fired in his direction by Tony, that he saw dust hit behind him and to his right. He stated when he looked at Tony, he saw him change his line of sight from John to his K-9 who had traveled farther south and was at the pond. Chambers said it was apparent Tony was aiming at his dog and he yelled at him "not to do it", he stated "don't take the shot". He said when the rifle went off he knew he had "hit the dog". Chambers said the dog immediately traveled to him with all his entrails hanging out and he shot his dog in the head. He said he did not shoot at Tony until after the dog was shot. At this time there were shots "hitting all around me" and after one or two steps from the dog he realized he was in a bad location, he discontinued shooting at Tony and attempted to sprint for the pond where there were some willows and possibly some cover.

Chambers said he only made one or two steps before he was hit, knocking him down and he then called Sgt. Goodwin on the radio stating he had been hit.

When further questioned about the ammunition Chambers had on his person when he left his vehicle, he stated the magazine in his pistol was full, that he had one other full magazine on his belt and another magazine that was only partially full and did not know for sure how many rounds it contained.

End of Follow-up/Case Continues

DEPUTY:  Date: 10/04/99 Typed by: cp
Lt. John Kimball Case #25156

YOUNG: Today's date is 9/9/99, time now 1550 hrs., Dep. Young with Dep. James White at the Vance Springs Ranch regarding an officer involved shooting, involving a John Chambers and a Tony Hamilton is the suspect.

inspiring

WHITE: On 9/8/99 I was in Milford, Utah where I contacted Deputy Sheriff Dave Mott on another detail. Dave Mott advised he was going out to Vance Springs on 9/9/99 and for me to contact Sheriff Yardley, they might be able to use my help. I contacted Sheriff Yardley by phone, probably 1230 or so on 9/8/99. He advised Raymond Goodwin would get a hold of me and advise me what time to meet them. Last night about 2100, Raymond Goodwin contacted me by phone and advised me to meet them on SR-21 it would be about the milepost 40.5 to a dirt road that turns off in Pine Valley to go to Vance Springs. On 9/9/99 at about 1020 hrs. Sheriff Yardley, Dep. Goodwin and Dep. John Chambers arrived at that area where I met them, we proceeded to Vance Springs. On the way into Vance Springs we came in contact with two of the suspects that was going to have to be removed for trespass, they were on their way to Milford. Sheriff Yardley and Dep. Goodwin went and talked with them. Dep. Chambers and myself continued onto to Vance Springs. As we neared the Vance Springs area, we stopped, Dep. Chambers got out of his vehicle and advised me he was going to walk in and for me to wait for Sheriff Yardley and Goodwin and get further advise from them, but he thought that one of us could just kind of surround the area to watch the gates to see if Tony Hamilton was still there that we might be able to apprehend him and take him in for trespass. Met Sheriff Yardley, Dep. Goodwin, we proceeded to the southeast corner of the ranch to a gate which is probably about a quarter of a mile north of the southeast corner and proceeded on foot. On our way in we heard a vehicle start up and it was headed eastbound towards us, it was a blue Ford pickup. It stopped in the road for a minute and then it turned around and left. At that point we searched the buildings there, there was nobody in the buildings, we then started to make a wider search when we heard probably four to five shots and then I heard John, Dep. Chambers advised that he had shot two tires out of the vehicle and it was up by the pond. We could hear the vehicle revved up and coming down. Dep. Goodwin and I started headed down the road from the cabins which was westbound. The vehicle headed a little more south so we scattered down through the trees. There was other shots fired. I could hear Dep. Chambers yelling at Tony. Dep. Goodwin was behind me and then the next thing, well lost sight of Tony and then I spotted, he was walking south to the end of the place, climbed over the fence where I noticed Sheriff Yardley confronted him and they talked there for probably 40-45 minutes, maybe longer. I finally went down and started talking with Tony. Sheriff Yardley advised Tony that he thought that he had shot Chambers and.....No, Tony advised Sheriff Yardley that he had shot Chambers in the leg and he had also shot his dog and he advised that he would go with us if we had a warrant. We had no paperwork. He said we had no right being there without a warrant. We talked for a little while. Sheriff Yardley went to check on Dep. Chambers. Tony and I walked around to the south end of the fence and then turned north on the eastbound fence going up, we

was going to unlock the gate for the ambulance to come in to take care of Dep. Chambers. We arrived there at the gate about 5 minutes later Sheriff Yardley arrived and said they wasn't there. Tony then said that to go up north, then on the outside of the fence, Sheriff Yardley told him to stop, that we needed to talk to him. Tony said he had already talked enough and continued walking. Sheriff Yardley continued talking with him. We both tried to talk to him and slow him down. We both got close and Sheriff Yardley was to the side, to the right side of him just a little bit so I tackled him and at that time we apprehended him, got the gun away and arrested him. When Sheriff Yardley confronted Tony down on the south end of the ranch, I was approximately a hundred yards away and it appeared that Tony had pointed the gun at Sheriff Yardley and it appeared that they were exchanging some pretty loud words at each other. When I got there Tony laid the rifle, the barrel of the rifle on a fence which was headed in my direction. It was pointed above my head. I asked Tony if he would please point the rifle in a different direction which he did. He also advised me that he was just protecting himself, that the officer had fired shots at him and he thought it was his constitutional right to protect himself. That was his reason for shooting the officer.

YOUNG: You didn't hear any threats from Tony towards Sheriff Yardley?

WHITE: No.

YOUNG: Interview with Dep. White concluded at 1600 hrs., same people present, myself and Dep. White.

End of Interview

DEPUTY: *Roger Young* Date: 9/18/99 Typed by: cp
Roger Young Case #25156

Statement by Raymond Goddard

footprints and I said let's walk in a circle here and see if we can see where these tracks are going. As we were walking in a circle to try to find where the tracks were going northwest from where we were at I heard several gunshots which sounded to be a handgun, I would say at least four shots. I told Jim something's gone to hell, let's get up there and find out what's going on. We took off on the run to the west, Dep. Chambers contacted me on the radio and I believe his exact words were, "Raymond, he's coming right toward you and he's got two flat tires". A very short time after that I observed the same blue Ford pickup that I'd seen when we first got on the property coming eastbound toward us, we were in the middle of the road, Jim White and I. The driver of that vehicle seen us when he got close to another road he turned and went south. As he started south I was about where the graveyards at and I started running down a little draw that's down that goes down through there, run down there I could see the pickup it was stopped down by the east of the farm and I was on the east side of the little ravine and I started to cross down. Just as I started to cross I heard a rifle report, a lot louder than the shots that I heard before. I called to John Chambers on the radio, he didn't answer, I called again, there was still no answer. I could then see the pickup, I could see a person laying across the hood, the pickup was basically in a westerly direction. This person, as I got closer, I am familiar with Tony Hamilton and was able to identify Tony, I was probably somewhere between 150-175 yds. After the rifle shot I heard several what sounded like handgun shots, I heard another rifle shot, I could hear John running, or I couldn't hear him running, but I could hear him hollering, "you mother fucker you killed my dog, you're a dead man Tony". I heard another rifle shot, more what sounded like handgun shot and as I was crossing the ravine I heard a bullet buzz that went to my left right after that I heard a rifle shot, right after that I heard another bullet buzz to my right and another rifle shot. Looking at the truck I could see Tony standing by the somewhere on the drivers side of the truck, away from the truck, a partly dead cedar tree which I run over and got behind it, called John on the radio, John told me he had been hit. I asked him how bad and he said it was bad, called him a couple more times, there was no answer. I could no longer see Tony by the truck, I ran to the south where the little draw I was in started to open up, I wanted to get around to where John was at. I could see there was no way that I could get from where I was at to where it appeared to be John laying out in the middle of a field in an open area without running into Tony. As I evaluated the situation John being hit, I decided the best thing for me to do was get back to my truck which was on the west side of the property. I run through the trees past the house over to the gate, climbed the gate, got in my truck, went back out to the main road, started in a southwesterly direction around to the southwest corner of where there used to be a gate there. That gate was also barricaded with the same type of pipe and cement. I pulled off the road to the left, went to where I could cut the fence and get through the fence, jumped out, cut the fence, got back into my vehicle and drove onto the property over to where there's a rock house and a pond and as I approached the area I could see Tony's truck or the truck that Tony was in, could not see Tony anywhere around there. Went to where John was at, put

Establishes knowledge
with Naligan interview

#5510

Indian Creek Veterinary Services

P.O. Box 2320 • 1501 N. Hwy 357 • Beaver, Utah 84713
(435) 438-2873 • FAX (435) 438-5785

RUDY L. JORDAN D.V.M.



Sept
~~August~~ 10, 1999

James W. Masner, Detective
Millard County Sheriff's Office
765 South Hwy 99
Fillmore, UT 84631

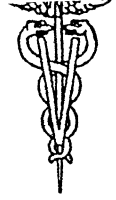
Dear Detective Masner:

Please find enclosed the necropsy report on Max. Also find enclosed an invoice for services rendered. Thank you for asking us to help. Good luck building your case.

Regards,

Rudy
R. L. Jordan, DVM

~~Beaver Veterinary Services~~
P.O. Box 2320 • 1501 N. Hwy 357 • Beaver, Utah 84713
(435) 438-2873 • FAX (435) 438-5785
RUDY L. JORDAN D.V.M.



Sept -
~~August~~ 10, 1999

A necropsy is requested by the Millard County Sheriff's Office on "Max" a law enforcement dog who was allegedly shot on August 9, 1999.

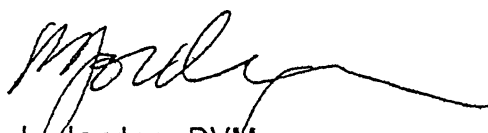
Sept. 14, 1999

Max is a 7yr old Belgium Malamos tan and black in color. He is current on all vaccinations evidenced by records held by our clinic.

Findings: A large portion of the small intestine is eviscerated through a wound (approximately 4 cm in length and 1.5 cm in width) in the right lower flank. Copious amounts of blood both clotted and unclotted are present in the abdominal cavity. The clotted blood is centered in an area at the pelvic inlet. The caudal aorta at the iliac bifurcation has been destroyed. Both internal and external iliac arteries are also destroyed. A small wound 2-3mm in diameter is present in the left lateral perineal area.

Conclusions: This animal was shot from the rear at some angle such that the bullet entered the perineal area travelling through the pelvic canal until such time as the bullet hit the caudal aorta and associated branches and then exited the abdomen in the right lower flank. Cause of death was exsanguination due to the severing of a major blood vessel.

Questions about this matter can be directed to my office at the above listed phone and address.


R. L. Jordan, DVM
Utah License 118009

(15) (S) 0.0

EDWARD K. BRASS (432)
Attorney for Defendant
321 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 322-5678
Facsimile: (801) 322-5677

IN THE FIFTH JUDICIAL DISTRICT COURT

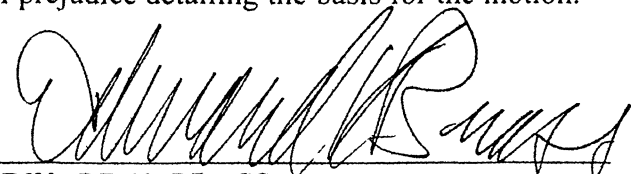
IN AND FOR BEAVER COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, v. Tony-Alexander: Hamilton, a.k.a. TONY ALEXANDER HAMILTON, a.k.a. RICHARD ADAM, Defendant.	MOTION TO DISQUALIFY JUDGE AND CERTIFICATE OF GOOD FAITH Case No. 991500129 Judge Kay L. McIff
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The Defendant, Tony-Alexander: Hamilton, by counsel, Edward K. Brass, hereby moves to disqualify the Court from this case.

This motion is supported by an affidavit of prejudice detailing the basis for the motion.

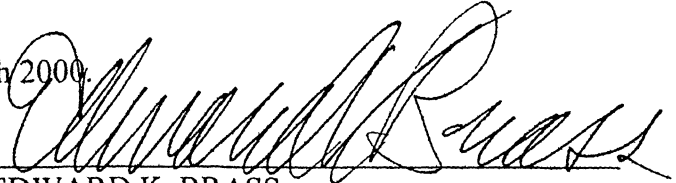
DATED this 21 day of March 2000.


EDWARD K. BRASS
Attorney for Defendant

CERTIFICATE OF GOOD FAITH

I hereby certify that this motion to disqualify and accompanying affidavit are filed in good faith.

DATED this 21 day of March 2000.


EDWARD K. BRASS
Attorney for Defendant

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Motion to Disqualify and Certificate of Good Faith was mailed, postage pre-paid, to Scott M. Burns, Special Deputy Beaver County Attorney, P.O. Box 428, Cedar City, Utah 84720, this 21 day of March 2000.



EDWARD K. BRASS (432)

Attorney for Defendant

321 South 600 East

Salt Lake City, Utah 84102

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IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR BEAVER COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff. v. Tony-Alexander: Hamilton, a.k.a. TONY ALEXANDER HAMILTON, a.k.a. RICHARD ADAM, Defendant.	AFFIDAVIT OF PREJUDICE Case No. 991500129 Judge Kay L. McIff
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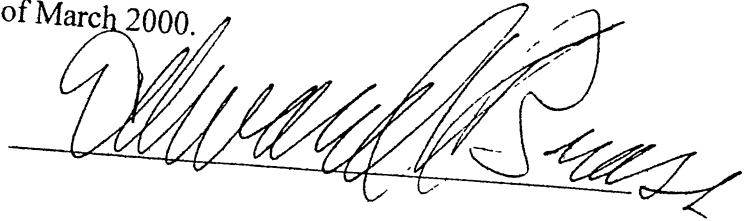
STATE OF UTAH)
 :SS
COUNTY OF SALT LAKE)

Edward K. Brass, being duly sworn upon his oath as the affiant herein files this his Affidavit of Prejudice against the Honorable Kay L. McIff, Judge in the above entitled case. and alleges as follows:

1. I am counsel for the Defendant, Tony-Alexander: Hamilton.
2. I have learned that the defendant has sued Judge McIff civilly in the following case: Tony Alexander Hamilton v. Paul G. Barton, Bruce Brown, John Chambers, Kenneth Yardley, Raymond Goodwin, James White, Leo G. Kanell, Ed Phillips, John Kimball,

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Affidavit of Prejudice was mailed, postage pre-paid, to Scott M. Burns, Special Deputy Beaver County Attorney, P.O. Box 428, Cedar City, Utah 84720, this 21 day of March 2000.

A handwritten signature in cursive script, appearing to read "Scott M. Burns", is written over a horizontal line.

EDWARD K. BRASS (432)
Attorney for Defendant
321 South 600 East
Salt Lake City, Utah 84102
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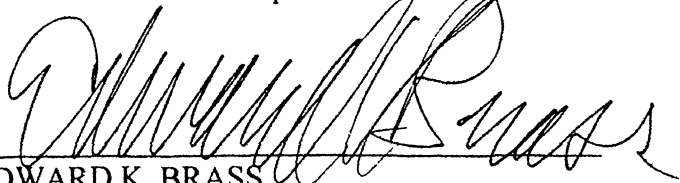
IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR BEAVER COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, v. Tony-Alexander: Hamilton, a.k.a. TONY ALEXANDER HAMILTON, a.k.a. RICHARD ADAM, Defendant.	MOTION TO APPOINT SPECIAL PROSECUTOR Case No. 991500129 Judge Kay L. McIff
--	---

The Defendant, Tony-Alexander: Hamilton, by counsel, Edward K. Brass, hereby moves the Court to appoint a special prosecutor in this case.

This motion is supported by a memorandum of points and authorities.

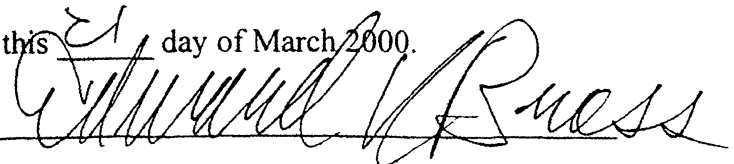
DATED this 21 day of March 2000.



EDWARD K. BRASS
Attorney for Defendant

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Motion to Appoint Special Prosecutor was mailed, postage pre-paid, to Scott M. Burns, Special Deputy Beaver County Attorney, P.O. Box 428, Cedar City, Utah 84720, this 21 day of March 2000.



EDWARD K. BRASS
Attorney for Defendant

EDWARD K. BRASS (432)
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321 South 600 East
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IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR BEAVER COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, v. Tony-Alexander: Hamilton, a.k.a. TONY ALEXANDER HAMILTON, a.k.a. RICHARD ADAM, Defendant.	MEMORANDUM SUPPORTING MOTION TO APPOINT SPECIAL PROSECUTOR Case No. 991500129 Judge Kay L. McIff
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FACTS

Mr. Hamilton is facing numerous serious criminal allegations in the above-entitled case. which is currently being prosecuted by Special Deputy Beaver County Attorney Scott M. Burns.

Mr. Hamilton has sued the prosecutor in numerous civil matters, including:
Many of these cases involve property disputes between Hamilton and the local government. the underlying background facts of this case.

As is detailed below in the argument, the juxtaposition of Mr. Hamilton and Mr. Burns as civil adversaries creates a conflict of interest which calls for the appointment of a special prosecutor.

ARGUMENT

UTAH CODE ANN. §77-10a-12 provides the mechanism by which the Court is empowered to alleviate prosecutorial conflicts of interest by appointing special prosecutors. That provision states.

(1) The state may be represented before any grand jury summoned in the state by the attorney general and his assistants, county attorney or district attorney and his deputies, and special prosecutors appointed under this chapter and their assistants.

(2) The supervising judge shall determine if a special prosecutor is necessary. He may appoint a special prosecutor only upon good cause shown and after making a written finding that a conflict of interest exists in the office of the attorney general or the office of the county attorney or district attorney who would otherwise represent the state before the grand jury.

(3) In selecting a special prosecutor, the supervising judge shall give preference to the attorney general and his assistants, and the county attorney or district attorney and his deputies.

(4) (a) The compensation of a special prosecutor appointed under this chapter who is an employee of the Office of the Attorney General or the office of a county attorney or district attorney is only the current compensation he receives in that office.

(b) The compensation for an appointed special prosecutor who is not an employee of a prosecutorial office under Subsection (4)(a) shall be comparable to the compensation of a deputy or assistant attorney general having similar experience to that of the special prosecutor.

"It is clear that a prosecutor should be disqualified on a timely motion when he has a personal conflicting interest in a case." State v. Nickles, 728 P.2d 123, 131 (Utah 1986). It is critical that prosecutors be conflict free, because of their unique ethical obligations. As the court explained in State v. Hay, 859 P.2d 1, 7 (Utah 1993).

[T]he prosecution's responsibility is that of "a minister of justice and not simply that of an advocate," which includes a duty "to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." A criminal trial is more than a contest between the prosecution and the defense; it is a search for the truth.

Another good description of the unique role of prosecutor comes from the dissenting opinion of Justice Powers in United States v. Musser, 7 P. 389, where he stated,

A prosecuting attorney is not a plaintiff's attorney, but a sworn minister of justice. as much bound to protect the innocent as to pursue the guilty: Wellar v. People, 30 Mich. 16.

His position is one involving a duty of impartiality, not altogether unlike that of the judge himself. The position is a trying one, but the duty, however, exists: Meister v. People, 31 Mich. 99.

He represents the public interests, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simple justice, and he has no right to sacrifice these to any pride of professional success, and however strong may be his belief in the prisoner's guilt, he must remember that though unfair means may happen to result in doing justice to the prisoner in the particular case, yet justice so attained, is unjust and dangerous to the whole community; Hurd v. People, 25 Mich. 405.

Id. at 401-02.

An actual conflict of interest is demonstrated when a person is faced with choices which would advance his interests, to the detriment of his client's. See e.g. State v. Lovell, 1999 UT 40, at ¶22: 984 P.2d 382, 387, cert. denied, 145 L.Ed.2d 679 (2000).

Black's Law Dictionary defines the phrase "conflict of interest" as follows:

Term used in connection with public officials and fiduciaries and their relationship to matters of private interest or gain to them. Ethical problems connected therewith are covered by statutes in most jurisdictions and by federal statutes on the federal level. Generally, when used to suggest disqualification of a public official from performing his sworn duty, term "conflict of interest" refers to a clash between public interest and the private pecuniary interest of int individual concerned. Gardener v. Nashville Housing Authority of Metropolitan Government of Nashville and Davison County, Tenn., C.A. Tenn., 514 F.2d 38, 41.

Under these definitions of actual conflict of interest, the prosecutor has a conflict of interest in this case, because he has a demonstrated adversarial relationship against Mr. Hamilton, involving

the prosecutor's personal interests, and is simultaneously charged with maintaining the equanimity required of a minister of justice in the case between the government and Mr. Hamilton. In his position as prosecutor in this case, Mr. Burns will be left to choose between taking actions which further his personal interests, or actions which further the lofty interests of his prosecutorial office. See e.g. Lovell; Black's, *supra*.

It appears that in this context, the Court must balance whatever interest the State of Utah has in having Mr. Burns continue with this case, against the need to protect the integrity of the justice system, and the appearance of fairness of the justice system. As the court explained in Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985),

Motions to disqualify opposing counsel present the court with two important but often opposing policy considerations: on the one hand, the undesirability of separating litigants from the counsel of their choice and, on the other, the necessity of ensuring that litigants and the public perceive lawyers and courts as possessing the integrity necessary for the disposition of justice. We are especially mindful of the latter consideration, as this Court is charged by law with approving and administering rules of conduct and discipline governing the practice of law in the State of Utah. U.C.A., 1953, §§ 78-51-14, -19 (1977). Among the guidelines for professional conduct which we have approved is Canon 9, which states: "A lawyer should avoid even the appearance of professional impropriety." The basis of this tenet is that society's perception of the integrity of our legal system may be as important as the reality, since it is the perception that engenders public confidence that justice will be dispensed. . .

"The practice of law is a profession whose members are granted a special privilege of holding themselves out as having the education, the skills and the integrity to give help and guidance to others in their affairs This includes that the attorney will become unreservedly identified with his client's interests and protect his rights. It means not only in dealing with the client's adversary, but also that the attorney will adhere to the ideals of honesty and fidelity with the client himself; and that he will not use his position to take any unfair advantage of the special confidence which the client is entitled to repose in him."

Id. at 1204 (citation omitted).

While Mr. Burns is obviously an attorney of the highest caliber, whom the State of Utah is fortunate to have as a public servant the civil litigation between him and Mr. Hamilton creates an appearance of impropriety that is inimical to the appearance of the justice system. Given their relationship as civil adversaries, Mr. Burns should not wield the power of the prosecutor against Mr. Hamilton. Thus replacing Mr. Burns with a conflict free special attorney is in order. See id.

Dated this _____ day of March 2000.

EDWARD K. BRASS
Attorney for Defendant

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Memorandum Supporting Motion to Appoint Special Prosecutor was mailed, postage pre-paid, to Scott M. Burns, Special Deputy Beaver County Attorney, P.O. Box 428, Cedar City, Utah 84720. this _____ day of March 2000.

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APPEARANCES

FOR THE PLAINTIFF:

SCOTT BURNS
MARY-KATHLEEN WOLSEY
IRON COUNTY ATTORNEY
P.O. BOX 428
CEDAR CITY, UTAH 84721

FOR THE DEFENDANT:

EDWARD K. BRASS
321 SOUTH 600 EAST
SALT LAKE CITY, UTAH 84110

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1 (The following proceedings were
2 held in chambers:)

3 THE COURT: Just let me show you, I have two jury
4 lists. That's alphabetical.

5 MR. BRASS: This is a sorted one.

6 THE COURT: And this is a sorted one. This is
7 computer sorted. Here's what my inclination is. Usually,
8 I use a strike and replace, but where we are looking at
9 this many jurors, I'm inclined to fill the box with 14 or
10 so, and then fill the front row so we've got about 30
11 people to start with. And that we'll focus in on that
12 first 30 and deal with them in detail. If we need to
13 retire to chambers for any private questions or responses,
14 we can get to that. But I'd like to get about 30 people
15 that we think are qualified that we can deal with in terms
16 of peremptories and paneling. I am proposing that we seat
17 two alternates and that each of you have five peremptory
18 challenges.

19 MR. BRASS: That's okay.

20 THE COURT: Is that okay?

21 MR. BRASS: Sure.

22 THE COURT: So we would need 20 people after
23 challenges for cause.

24 MR. BURNS: Yeah.

25 THE COURT: So we'll try to qualify out there,

1 without making any motions to disqualify for cause, try to
2 get about 20 people.

3 MR. BURNS: The alternate is who?

4 MR. BRASS: Last two.

5 THE COURT: Last two.

6 MR. BRASS: What about --

7 THE COURT: And then we come in chambers on the
8 record and talk about challenges for cause and see if the
9 30 we've got give us enough room for challenges for cause.
10 If they don't, we'll go out and seat the second row and
11 then come back and look at the challenges for cause again.

12 MR. BRASS: What about the strike and replace.
13 You start talking about that. I have tried a couple of
14 cases with you in the past. And that's confusing for me, I
15 have to tell you. I mean, because you've got, all of a
16 sudden, number seven's open, and you are plugged in to a
17 different person, and you are taking notes in the same box.
18 Maybe I got to come up with a different style.

19 THE COURT: I am proposing not to use that today.
20 Frankly, it's the only procedure that has been authorized
21 by the rules.

22 MR. BRASS: Rule?

23 THE COURT: Since statehood.

24 MR. BRASS: Really?

25 THE COURT: Yes.

1 MR. BURNS: That's the only procedure I have ever
2 done.

3 MR. BRASS: I have never done it that way except
4 with you.

5 THE COURT: The third district started doing this
6 struck method where you start doing it like I am talking
7 about.

8 MR. BURNS: Then they are gone.

9 MR. BRASS: Say you take number seven off. He
10 said 30, you would start talking to 31. And --

11 MR. BURNS: Seven's gone.

12 MR. BRASS: And you count down eight from the top,
13 however many there are.

14 THE COURT: Right. When you actually -- if we
15 qualify -- let's say we qualified 30. Thirty's on our list
16 when it comes to you for peremptories. Well, that will
17 work, it's either 35, thirty-five on that list. It's --
18 you start from the top down.

19 MR. BURNS: So we take the first 20.

20 THE COURT: You take the first -- well, we take
21 the first 10 that are not stricken.

22 MR. BRASS: Right. But we are picking from the
23 first 20.

24 THE COURT: Picking from the first 20. But if you
25 strike number 34, it just means you are --

1 MR. BRASS: It's dumb.

2 THE COURT: -- your strike doesn't mean anything,
3 that we are taking from the top down.

4 MR. BURNS: Doesn't mean anything. That's what I
5 would probably do.

6 MR. BRASS: Okay. I got it.

7 THE COURT: All right.

8 THE CLERK: I'm not sure I have it clear.

9 THE COURT: We are going to fill the box from the
10 front row. I think that will give us about 30. You can
11 give us a couple extra chairs in front. Give us four
12 chairs in front there, and then we won't crowd the front
13 row. We may get 30, we may get 32 when we have that front
14 row filled up.

15 THE CLERK: You want 16 for the panel then, or do
16 you want 18? I mean, for the panel, 18 chairs over there
17 and --

18 THE DEFENDANT: Yeah, give me 18 chairs, then we
19 fill the front row.

20 THE COURT: Then we fill the front row. That's
21 going to give us 30, 32 apiece.

22 THE CLERK: Okay. And when I get to it, the
23 peremptory list, do you want me to list them, the ones that
24 are left, because that's when I fill in that peremptory
25 list, the ones that we are selecting from.

1 THE COURT: Say you have a list of 32, that's the
2 box, and the front row.

3 THE CLERK: Right.

4 THE COURT: We have 32. We are going to not
5 eliminate any of them out there unless there is somebody
6 that just needs to be eliminated clearly, because his
7 brother is married to the sheriff's wife's sister. So we
8 say I'm going to have to let you go. I'll let him go right
9 on the spot. If I do that, then don't include that person
10 on your list. But we'll come up back here with a list of
11 30, 32 people before we have exercised any challenges for
12 cause, unless I have preemptively done it out on the bench.
13 We'll come back here and we'll talk then about challenges
14 for cause. We may strike off eight for cause. And then
15 they are just removed from your list. And your list
16 shortens up. But you can just put, right to the list,
17 strike him out for cause and hand them the list that
18 remains. That's the list they are going to exercise their
19 peremptories from. And they will exercise their
20 peremptories. And the first 10 going down that still
21 remain, those will be the jury.

22 Does that make sense?

23 MR. BRASS: Sure. Yes. Can we get one of these?
24 The sorted list.

25 THE COURT: Yep. She's going to give you --

1 she'll give you both lists.

2 *THE CLERK:* You want this one here?

3 *THE COURT:* Yeah. But I want to talk with you
4 first about something else. See those four with the red
5 box checks, and that one?

6 *THE CLERK:* Let me make a correction. This one,
7 Orlene Chestnut and Virginia Dastrup are the only two that
8 have not reported in.

9 *THE COURT:* But these were summonsed on the
10 other --

11 *THE CLERK:* But they don't know it.

12 *THE COURT:* Okay. We have two juries scheduled
13 this morning. One case settled. And they called all the
14 jurors not to come in, except these five were not called.
15 They couldn't receive them. So those are going to -- well,
16 she said three of them have already reported in. They
17 assume they are on this panel. I question to you, what do
18 you want me to do with them? Do you want me to strike
19 them? Do you want me to put them at the bottom, see if we
20 need to get to them, or do you want me to leave them in the
21 order they now appear?

22 *MR. BRASS:* Well, they are past what you perceive
23 to be the cutoff anyway, so is it really a problem?

24 *THE COURT:* Well, it would only be a problem when
25 we come back here and we don't have enough jurors. If we

1 have to strike for cause, you know, too many, then we'll go
2 back out and qualify a bunch more, then we'll come back
3 again. So I can either leave them where they are or I can
4 put them at the bottom of the list.

5 MR. BRASS: Why don't we just leave them where
6 they are, since the list is already done, especially.

7 THE COURT: Is that okay with you?

8 MR. BURNS: That's all right with me.

9 THE COURT: Okay. She'll give you a photocopy of
10 this and you can see the checks. They were summonsed, they
11 don't know what case they were summonsed for, but it
12 doesn't matter to us. All right. Why don't we get
13 Mr. Hamilton here. I want to put on the record our venue
14 stipulation if we haven't done that.

15 MR. BRASS: Yes.

16 THE COURT: And then I'll discuss with you these
17 motions. And I'll tell you where I think I am, and you can
18 respond if you need to. Anything else that either of you
19 is aware of?

20 MR. BRASS: You think you are going to go past tax
21 stuff today?

22 MR. BURNS: No. I don't anticipate. I guess it
23 just depends on how fast it goes.

24 MR. BRASS: Okay.

25 MR. BURNS: Do you care if I give him this?

1 MR. BRASS: No.

2 MR. BURNS: That's a proposed witness list. And

3 that's a proposed exhibit list that sets forth the exhibit

4 as marked and the witnesses that may be necessary to

5 introduce those exhibits. Kind of play it by ear.

6 THE CLERK: We have Mr. Hamilton here.

7 THE COURT: Come in, Mr. Hamilton, if you will,

8 please.

9 Let's get another chair for him. We'll get a

10 chair.

11 We'll get a seat for you, Mr. Hamilton.

12 MR. BRASS: So they came through with the clothes?

13 THE DEFENDANT: Yeah.

14 THE COURT: The record may reflect that we are in

15 chambers. I've had a discussion in the past few moments

16 with counsel. I have had a reporter here. And he's been

17 taking down what we have talked about as we waited for you

18 to come.

19 Very briefly, here's what we have talked about.

20 We are going to be selecting the jury this morning. And I

21 have two jury lists. One list is alphabetical. And your

22 counsel has a copy of this. And it shows an alphabetical

23 list of all the perspective jurors by name and the

24 community in which they live within this county. I have a

25 second list that has been produced by the computer

1 randomizing the order of all of these persons so that we'll
2 call the role alphabetically to see who we have here. But
3 then when it comes to seating the perspective jurors, as
4 selecting them, we won't follow alphabetical order, we --
5 the computer program that randomizes that and just gives it
6 to us all mixed up. And my clerk has that list right now
7 copied. You see it starts with R. W. A. B. F. S. Anyway,
8 we'll seat them this -- in this manner. Seat them in the
9 box and on the front row. We'll seat about 30 people or
10 so.

11 From that group, we will ultimately select eight
12 persons plus two alternates to hear the case. I select two
13 alternates in case something were to happen in the course
14 of a week that prevented one from serving. I would propose
15 not to identify who the alternates are until they retire to
16 deliberate. Then the two will be excused. The last two
17 selected would be the alternates. So it would be -- we'll
18 end up with 10, and the two bottom ones will be the
19 alternates. I won't tell them now because I want them to
20 pay close attention. I will tell them there will be two
21 alternates. But that's all I'll tell them. When they
22 retire to deliberate, I'll excuse the alternates. Is that
23 agreeable?

24 MR. BRASS: Sure.

25 THE COURT: Agreeable?

1 MR. BURNS: Agreeable, Your Honor.

2 THE COURT: Are you agreeable with -- both sides
3 agreeable with the randomization which has occurred through
4 the computer?

5 MR. BURNS: Yes, sir.

6 MR. BRASS: Yes.

7 THE COURT: Thank you. We'll seat, as I said, in
8 the box 18, then about however how many the front row will
9 accept, maybe another 12 to 15. So, hopefully, we'll have
10 around 30, 32 persons off the top of this list. That will
11 take us first page and maybe over on the second page. Then
12 I'll individually qualify those. I'll ask them some
13 general questions about who they are and any ties to this
14 case or any information. I'll ask them those questions.
15 Then I'll allow counsel, allow you to supplement questions
16 that you wish to ask.

17 MR. BRASS: Directly or through you?

18 THE COURT: Well, I want you to run them by me.

19 MR. BRASS: Okay.

20 THE COURT: I want to be generous, but I would
21 appreciate it if you would run them through me. Then we'll
22 ask them. I want a fair jury. And I know all of us want
23 that. Anyway, when we complete that process, with those 30
24 or 32, I will not require any challenges for cause to be
25 made on the record out in the presence of the potential

1 jurors. We will come into chambers here, and I'll ask
2 counsel for challenges for cause. These are people who
3 shouldn't serve because of some tie to this case or some
4 special factor that disqualifies them. Then we'll have a
5 list that remains. There must be at least 20 persons on
6 that list after those have been stricken for cause. And on
7 that 20, now I propose that each side be allowed to strike
8 five for whatever reason they want -- well, subject to the
9 constitutional limitations. You can't strike based on race
10 or sex. But, anyway, you strike them, prosecution one,
11 defense one, prosecution two, defense two, until 10 people
12 are stricken. That will leave 10 remaining. Those 10 will
13 hear the case. The first eight plus the two next will be
14 the alternates. Any question about that, Mr. Hamilton?

15 *THE DEFENDANT:* No, sir.

16 *THE COURT:* All right. If we have more challenges
17 for cause than we have jurors qualified, when we have that
18 first in chambers review, we'll go back out and we'll fill
19 up that second row out there in the same order. We'll just
20 start with where we left off on this list, 31 or two or
21 whatever, and we'll just go down and pick up the next
22 bunch, and we'll qualify them. Then we'll come back in
23 here and exercise our challenges for cause. That's
24 agreeable?

25 *MR. BRASS:* Yes.

1 MR. BURNS: Yes.

2 THE COURT: All right. See any question about our

3 jury selection process?

4 MR. BURNS: No.

5 MR. BRASS: No.

6 THE COURT: Okay. Now, there are a couple other

7 things I thought we ought to do here this morning. One has

8 to do with the matter of venue. This is a Beaver County

9 case. Everything about it is Beaver County except we are

10 hearing it here in Richfield. I moved it here on the basis

11 of a telephone conference with both lawyers indicating they

12 felt like it would be difficult to obtain a fair trial in

13 Beaver County. We talked about the possibility of moving

14 it to Iron County next door to the south. This county

15 neighbors on the east. And I think both sides preferred to

16 do it here in Sevier County and so stipulated. Is that

17 correct, Mr. Burns?

18 MR. BURNS: That's correct, Your Honor.

19 THE COURT: Mr. Brass?

20 MR. BRASS: That's correct.

21 THE COURT: And you agree, Mr. Hamilton?

22 THE DEFENDANT: I do.

23 MR. BURNS: And, for the record, the main reason I

24 stipulated to come here and not my home county is, you

25 know, deference to counsel to drive, and the deference to

1 the defendant that there not be any appearance that I tried
2 to move it to Iron County. I think this is a neutral
3 county.

4 MR. BRASS: You never suggested that it be moved
5 to Iron County, actually.

6 MR. BURNS: Right.

7 THE COURT: I raised that possibility with both
8 lawyers. All right. Now, I have several motions, pretrial
9 motions that have been filed. If you are in agreement,
10 I'll give you my take as to where I am on those motions.
11 If there is something else I should consider, then --

12 MR. BRASS: They are my motions, so I am in
13 agreement with that proceeding.

14 THE COURT: All right. Now, there is a motion in
15 limine with respect to gun ownership.

16 MR. BRASS: It's styled that way. But let me help
17 you with that before we go too far into it. Scott and I
18 met to go over with the evidence, would be in the exhibits
19 in an effort to make this a little bit faster. And there
20 were a number of, I'm going to say eight, I could be wrong,
21 two in either direction, probably, rifles and shotguns that
22 were seized in a trailer that was purportedly occupied by
23 Mr. Hamilton after this event occurred. The trailer,
24 frankly, in my view, has nothing to do with this case at
25 all. It never was near the trailer, by the trailer. None

1 of these actions take place anywhere.

2 THE COURT: Trailer is on the property.

3 MR. BRASS: It's on the property, but the property
4 is 640 acres. And I'm not real clear in my own mind how
5 close to the trailer any of this stuff happens, but it's
6 not anywhere near --

7 THE COURT: Okay.

8 MR. BRASS: -- those guns, in my view. Really
9 don't have anything to do with this case. One aspect that
10 a juror might conclude is this is some heavily armed
11 recluse that's prepared to shoot it out with the police
12 just by virtue of his armaments. I'm concerned by the
13 number of firearms will be used in some way by the jury in
14 a prejudicial fashion against Mr. Hamilton. They weren't
15 used. They don't have any connection to this case. I
16 don't believe that Sergeant Chambers knew that they were in
17 there. There is no discussion about them in any reports
18 anywhere other than they are taken out of the trailer and
19 that's it.

20 THE COURT: Okay.

21 MR. BRASS: So it's more than ownership. And I am
22 sorry I styled it that way, but it's more than just
23 ownership.

24 THE COURT: All right. I think I understand your
25 motion. I read your response. Anything else?

1 MR. BURNS: Just to supplement it, I think it's
2 key to this case why Deputy Chambers shot out the tires of
3 this defendant. He testified as recently as a couple of
4 weeks ago in Fillmore, before Judge Eyre, that he did not
5 want the defendant to get to that rock house or -- where he
6 had seen a large number of long rifles, or he did not want
7 the defendant to get access to that type of armament. And
8 that's why he shot out the tires. And I think it's not
9 only relevant, I think it's crucial to the state's case to
10 show that. I'm not going to call him a gun crazy recluse.
11 But I guess he had all those guns and he had all that
12 ammunition. And I think it is very, very relevant. He was
13 also mobile in a truck. And the fact that he didn't get
14 there doesn't mean that he wouldn't or couldn't. He drove
15 the truck, then he was later on foot. So I think it's very
16 relevant to show he had access to that kind of fire power.

17 THE COURT: All right. Well, I'm willing to treat
18 it as it surfaces, but my general -- my general response is
19 this: The mere fact of gun ownership I do not consider
20 relevant. Nor is it appropriate to introduce the fact of
21 gun ownership to show bad character. To the extent that
22 the officer has knowledge and to the extent that the facts
23 lend themselves to the reasonable conclusion that the
24 defendant could access, either immediately or by avoiding
25 arrest, could access a place where he could dig in and give

1 rise to serious threats to the officers or others, then it
2 could be relevant. But it would require a solid
3 foundation.

4 I'm of the view that the crucial issues in this
5 case, based on what I've heard today, center around the
6 reasonableness of the officers' conduct and the
7 reasonableness of the defendant's response in defense of
8 his person. We are just going to have to let that unfold.

9 And the mere fact of reasonableness suggests that what
10 these people were aware of and what they were perceiving is
11 germane.

12 MR. BRASS: So that motion --

13 THE COURT: I'll just --

14 MR. BRASS: It's under advisement.

15 THE COURT: It's under advisement. I'm giving you
16 a general feeling of where I am. I can see it being
17 relevant if there is sufficient foundation.

18 MR. BRASS: Okay. Fair enough.

19 THE COURT: All right. With respect to
20 prosecutor --

21 MR. BRASS: I'm going to -- just a minute.

22 (Whereupon, an off the record discussion took place.)

23 MR. BRASS: We'll withdraw that one.

24 THE COURT: You are going to withdraw that motion?

25 MR. BRASS: Yes. And the reason we are

1 withdrawing it is we are all here prepared to go to motion.
2 The motion asking you to recuse yourself has been denied.
3 We are ready to go. Everyone's here. We are going to
4 withdraw that motion.

5 THE COURT: All right. Thank you. The motion to
6 dismiss with respect to the service dog, the evidence that
7 I heard at this preliminary hearing was the dog was shot.
8 It left Officer Chambers. I gathered from the testimony of
9 Officer Chambers, then the testimony of the other -- or the
10 other law enforcement people recounting some conversation
11 with the defendant, and there is likely going to be a
12 dispute as to whether the dog was shot en route to getting
13 a drink in the pond or en route to attack the defendant.
14 But, in any event, that preceded the exchanging of deadly
15 fire between the defendant and Deputy Chambers. And so I'm
16 not persuaded that there is solid basis to suggest that the
17 dog wasn't a service dog at the time.

18 MR. BRASS: Let me make that one easier for both.
19 The one -- and the one that relates to Deputy Chambers, I
20 would ask you to do the same as you have done with respect
21 to count one. And to hold those, the purpose of those is
22 in part, of course, is to point out what I think will be
23 issues during the course of the trial, and wait and see
24 what the evidence is going to be at the conclusion of the
25 state's case.

1 THE COURT: I intend to do that. And my final
2 point on that motion is, I think there are several jury
3 questions that center about what the officer did, what the
4 defendant did, when they did it, and who fired first, who
5 invoked deadly force first. I think those are issues. We
6 are just going to have to see what the evidence shows.

7 The motion with respect to trespassing, the motion
8 in limine with respect to trespassing.

9 MR. BRASS: That's a tough -- let me just be heard
10 briefly on that. What happens with respect to this, as I
11 understand it, there is an effort to have a valid sale in
12 1991 through a fellow who will testify today, I imagine.
13 The problem is that it's advertised and sold pursuant to a
14 statute that doesn't exist.

15 THE COURT: First time.

16 MR. BURNS: First time.

17 MR. BRASS: First time. Fifty-nine time 64.

18 MR. BURNS: Second time they get the right
19 statute.

20 THE COURT: Up until the deed.

21 MR. BURNS: Until the deed.

22 MR. BRASS: That's irrelevant. I don't think it
23 is. I think they have to strictly comply with the statute
24 in order for it to be a valid sale. In fact, that they
25 used a wrong statutory on the deed itself, which is the

1 document that transfers title, means the sale is void in
2 spite of all that's taken place since that time. It's kind
3 of like the concept of jurisdiction, either you have it or
4 you don't. And they don't have it by filing a deed that
5 doesn't comply with the statute.

6 THE COURT: Well, I'm going to leave the -- I'll
7 leave it open. I won't totally foreclose it. Very
8 minimum, they are jury issues. But my initial inclination
9 is, having gone through the proper procedure the second
10 time around up until filing the deed, I'm not sure that the
11 deed even needed to recite the code. That may have been
12 surplusage in the deed, having no effect at all. In any
13 event, there was a follow-up action resulting in a judgment
14 not appealed which concluded that the defendant had no
15 right, title, or interest in the property. There was a
16 subsequent prosecution for trespass and conviction. I find
17 it difficult, in the wake of all of that, to argue
18 detrimental reliance and estoppel, but I'll leave it open.
19 But I wanted you to know my general impressions about that
20 motion.

21 MR. BRASS: Sure.

22 THE COURT: The motion in limine regarding
23 religious beliefs, I agree with the defense. And I presume
24 the prosecution, that the defendant ought not be convicted
25 for religious beliefs or ought not be any reliance on the

1 religious beliefs to sustain a conviction. The only
2 possible relevance is if somehow there is enough history of
3 this defendant and his relationship with the law and the
4 officers to form a basis in the officer's mind for
5 reasonable belief that he was in serious danger of bodily
6 harm. There may be some relevance, but it would be pretty
7 minimal. I'm assuming that that won't be an issue. Is it
8 in your mind?

9 MR. BURNS: I don't think his religious beliefs
10 are going to be an issue, Your Honor, to tell you the
11 truth. I don't know what his religious beliefs are. I
12 have no idea. And I say that with all sincerity. I have
13 had people ask me, well, what religion is Mr. Hamilton?
14 What is this all about? I tell them I don't know. But
15 what I do think is crucial to this case is for the state to
16 be allowed to show what his attitude is with respect to
17 government and with respect to law enforcement. And that
18 starts out in 1985 with the filing of the declaration by
19 the fraternity, then later a filing by the foundation, the
20 Emmanuel Foundation. Then a deed relating to the property
21 is deeded to that group. And I intend to spend all of
22 today going through the basic history of that property. I
23 will never refer to his religious beliefs. But I think
24 it's crucial to show the jury what happened for almost 15
25 years with respect to this property. It just didn't occur

1 on 9/9 of '99 that four law enforcement officers went out
2 there to chuck him off the property.

3 *THE COURT:* There is language in the brief filed
4 by Mr. Brass, which I thought -- let me see if I can find
5 it quick.

6 *MR. BURNS:* Are you just talking about referring
7 to his religious tenets?

8 *MR. BRASS:* No. How it's interwoven with all the
9 tax problems, you know. Because it really is. I mean,
10 that's what Leo testified about at the prelim is how
11 adamant they were that they were a religion and didn't need
12 to be bound by any of these procedures to perfect
13 tax-exempt status and, in fact, refused to even attend
14 meetings in that respect.

15 *MR. BURNS:* And I intend to put all of that on,
16 Your Honor. But I'm not going to believe what they believe
17 and don't believe. I think I am entitled to show that they
18 refused to pay taxes and that's why they lost the property.

19 *THE COURT:* Mr. Brass has quoted a Delaware case,
20 Dawson vs. Delaware, which includes this language, "but the
21 inference which the jury was invited to draw in that case
22 tended to prove nothing more than abstract beliefs on the
23 Delaware chapter of the Arian Brotherhood. Whatever label
24 is given to the evidence presented, however, we conclude
25 that Dawson's first amendment rights were violated by the

1 admission of the Arian Brotherhood evidence in this case,
2 because the evidence proved nothing more than Dawson's
3 abstract beliefs." Then this language. "The government
4 may not prohibit the expression of an idea simply because
5 it so finds the idea itself offensive or disagreeable.
6 Delaware might have avoided this problem if it had
7 presented evidence showing more than mere abstract beliefs
8 on Dawson's part."

9 Mr. Hamilton's beliefs, his religious beliefs, I
10 would not consider relevant, but acting out upon beliefs,
11 the actual conduct which laid a foundation for what
12 ultimately happened, seems to be, maybe, relevant.

13 Now, Mr. Brass, does that coincide at all with --

14 MR. BRASS: Relevance, though, Judge, is what I am
15 concerned about. See, this aptly summed it up earlier
16 about what this case is all about. Was the officer's
17 actions reasonable, or were the officers actions --
18 Mr. Hamilton's responses to those actions, were they
19 reasonable. If we get to the point where you are giving
20 instructions about self-defense and it requires the jurors
21 to put themselves, to some extent, in Mr. Hamilton's shoes,
22 then assess him by a reasonable man standard, just because
23 this is what's prejudicial about this stuff, and why it
24 really doesn't matter about as far as how this case turns
25 out, goes, we are going to hear about 15 years worth of

1 history about he's been in contention with Beaver County
2 over whether he needs to pay taxes for this property and
3 whether he continued to own it after they had a tax sale
4 and all that sort of business. That's what today is going
5 to take place. How is that going to help, in any respect,
6 a jury assess whether or not when a person shot at his
7 truck, then he drove off and got out of the car, shot the
8 dog? And even if they find him guilty of a Class A
9 Misdemeanor, last time I understood it, the death penalty
10 wasn't the penalty for a Class A Misdemeanor. Then the
11 officer announces his intention to kill him. A gun battle
12 ensues. How does all this business about 15 years of tax
13 dispute going to assess whether or not he acted as a
14 reasonable man would act under those circumstances? See
15 what I am worried about is, they will think because he's
16 different than most people who were sitting in that jury
17 room, most of the people in this room, really, that he's,
18 per say, an unreasonable person. And that's my concern.

19 THE COURT: Yeah. And I understand. I am
20 sympathetic to that. And when I wrote -- I wrote each of
21 you a letter, that joint letter, I said -- I asked you to
22 both consider what kind of instruction I should give the
23 religious defendant, or political philosophy. It will be
24 difficult to avoid some evidence in that area. I was
25 really suggesting an instruction, a defense instruction.

1 If there is some way that I can instruct that jury that
2 does what you want them, which is, don't judge this man as
3 unreasonable per say because of his religious views, or
4 don't draw these adverse conclusions or presumptions
5 because of his religious views, I'm willing to give you an
6 instruction.

7 MR. BRASS: Okay.

8 THE COURT: Now, what relevance all this history_
9 has, if it's relevant, here's where it will be relevant.
10 Chambers has the initial contact with the defendant in his
11 pickup. He doesn't stop. And that sets in motion all this
12 stuff that happens. And you are trying to evaluate the
13 reasonableness of the officer's -- what the officer did,
14 why he did it. And then the defendant's response, how
15 reasonable was the defendant's response. Those acts were
16 not done in a vacuum. Those acts had some history. Now,
17 I --

18 MR. BRASS: But the history is legal contention.
19 At least one of these other officers is going to testify,
20 assuming he testifies consistently with what he said at the
21 preliminary hearing, that he was shocked when he heard
22 gunfire. That he never knew Mr. Hamilton ever, in all the
23 years he had known him, to be a violent person at all, that
24 the only physical act of resistance that he had ever shown
25 was in his prior conviction for trespassing, and either

1 interfering or resisting, I can't remember which it is,
2 where he holds to a stove pipe inside of one of these
3 dwellings on this property. And they have to pry him loose
4 as they carry him off, which is more akin to 60's civil
5 rights passive resistance. There is not going to be any
6 evidence anywhere that he ever pointed a gun at anyone.
7 That he ever threatened anyone with a firearm. In fact,
8 this same fellow testified at the preliminary hearing, you
9 might recall, that he thought that he was respectful
10 towards law enforcement. So how does the fact that he's in
11 contention with the government have anything to do with
12 this, with what the issues are here? I mean, sure he's in
13 contention with the government if he's on trial. Where
14 being contention with the government, it all comes in.

15 MR. BURNS: If I could speak very briefly, Your
16 Honor. I don't know how I can try this case without
17 showing the jury the basis of the reason for why the
18 participants acted as they did on that day. Because I
19 agree with what you have said. And I think Mr. Brass will
20 agree with me, that I think the construction of this case
21 is the reasonableness of the action of the participants on
22 that day.

23 THE COURT: On both sides.

24 MR. BURNS: On both sides. And I also believe
25 that actions cannot be covered up. They not only did these

1 acts, but they recorded them with the Beaver County
2 recorder. How can you go in and record their uniform taxes
3 and record these declarations and notice and record all of
4 these things as public documents and then come to a court
5 of law and say, but we don't want anybody to know about
6 that. I think that is preposterous. They certainly wanted
7 the world to know about them.

8 MR. BRASS: Because now we are in a different
9 venue. That's the reason that now we are in a venue where
10 the charge is not, I'm an annoying sort of pro se litigant,
11 we are here to decide whether he's guilty of attempted
12 capital homicide. I don't think that his background, as
13 far as that goes, the fact that he's been litigious over
14 this property.

15 MR. BURNS: Your Honor, one of the elements I have
16 to prove is his attempt to kill them was because they were
17 trying to arrest him, or the reason he tried to kill them
18 because they were in their capacity as law enforcement and,
19 gee, why would he try and do that? Well, I don't know.
20 Well, I do. And I'll tell you why for 15 years. He
21 doesn't believe in having a driver's license. He doesn't
22 believe in taxes. He doesn't believe that Beaver County
23 authorities have any power over him. That's why he had the
24 intent to kill those two officers. Now, he recorded all of
25 those things. I've got to prove that. If you take that

1 all away, might as well be Oran Hatch standing out there,
2 and I am trying to prove he had the intent to kill the
3 officer. It's impossible. We wouldn't be here.

4 THE COURT: This is a delicate balance, because I
5 think the history has some relevance. But when Mr. Brass,
6 when you outlined the counter-evidence, that the evidence
7 that he was respectful, no prior showing of violence, et
8 cetera --

9 MR. BRASS: Which has nothing to do with his
10 religious beliefs or the tax problems.

11 THE COURT: Right. But that suggests to us that
12 we lay it out, and the jury's going to have to hear your
13 arguments based on how you interpret that evidence. I
14 don't want -- I don't want to try to paint a picture of
15 violence based solely on the litigiousness, because they
16 are not necessarily the same thing. But the litigiousness
17 is relevant and germane why the officers were even there,
18 why they had to deal with the issue in the first place of
19 the trespass and all those things. So --

20 MR. BRASS: I agree with that. Don't get me
21 wrong. I agree with what you just said. I think it's a
22 matter of degree. Some of it I'm not smart enough to
23 figure out how much. Okay? Some of it comes in to show
24 what you've just shown. I mean, they didn't just show up
25 there one day. I'm not going to claim that they went there

1 to do him in, you know, for no reason, that they didn't
2 have any reason whatsoever under the sun to be there. So I
3 think he's entitled to that. But, how far, you know? I
4 mean, how far do we go?

5 *THE COURT:* That's the issue. And we have talked
6 enough about it so you both have a feel for how I feel
7 about it. And I would rather you not make it too tough on
8 me, that you try to be within that framework. If you try
9 to be fair, if the jury is going to have to wrestle with
10 some things in this case --

11 *MR. BRASS:* No question.

12 *THE COURT:* All right. Let's see. Did I go
13 through all of them?

14 *MR. BRASS:* That's all of them. There is one
15 other thing.

16 *THE COURT:* The matter of the oath.

17 *MR. BRASS:* That's very important.

18 *THE COURT:* If I ask you, Mr. Hamilton, when you
19 take the stand, my intent would be to advise you that you
20 don't have to testify, that if you elect to testify, then
21 you are subject to cross-examination, and you must
22 understand that. I would ask you simply, do you know the
23 difference between the truth and a lie?

24 *THE DEFENDANT:* Um-hmm.

25 *THE COURT:* Are you prepared to affirm under oath

1 that the testimony you give will be the truth, the whole
2 truth and nothing but the truth?

3 *THE DEFENDANT:* Under the penalties of perjury, I
4 would not tell a lie. But my --

5 *THE COURT:* Is simply --

6 *MR. BRASS:* Wait a minute. He wasn't done. I
7 think he might have had some objection to that.

8 *THE DEFENDANT:* Within the holy scriptures,
9 Matthew 5 and 33, I shalt make all thine oaths to the Lord.

10 *MR. BRASS:* So I think it's adequate, Judge, just
11 to say to him that, Do you understand that you are bound to
12 tell the truth under the penalties of perjury?

13 *THE COURT:* Is that adequate?

14 *THE DEFENDANT:* That's fair enough with me.

15 *THE COURT:* I'll say that, and you say, yes, I
16 understand. Will you promise to tell the truth?

17 *THE DEFENDANT:* Yes, I will.

18 *THE COURT:* All right. That's good enough.

19 *MR. BRASS:* There is two other witnesses that
20 apply. I think it's his first two.

21 *MR. BURNS:* Are they here?

22 *MR. BRASS:* I thought I saw Talmage.

23 *THE COURT:* I would rather you tell me who they
24 are. I think it will be better for them and better for all
25 of us if you alert me, and I can simply say, do you promise

1 to tell the truth.

2 MR. BURNS: Judge, I didn't get that motion until
3 probably Saturday, so I haven't looked at that.

4 THE COURT: Well, it's just --

5 MR. BURNS: I understand. But could we -- I mean,
6 is there some basis for this?

7 THE COURT: There is.

8 MR. BURNS: Okay. You don't have to say I swear
9 to God?

10 THE COURT: Courts have held that you have to have
11 an affirmative expression of a promise to tell the truth.

12 MR. BURNS: All right.

13 THE COURT: And but I would rather -- I would
14 rather ask them if they promise to tell the truth. They
15 understand the difference between the truth and a lie and
16 they promise to tell the truth.

17 MR. BURNS: You just don't want it to come up so
18 it looks like in front of the jury that they are different.

19 MR. BRASS: Different, yeah.

20 THE COURT: And I think they will do themselves a
21 disservice, and even you will do yourself a disservice if
22 you quote Matthew, not that these people don't believe in
23 Matthew.

24 MR. BURNS: Go ahead.

25 THE COURT: It just sorts you out, and it will

1 make you --

2 THE DEFENDANT: I just said that through the
3 convenience here.

4 MR. BRASS: You can add under penalties of
5 perjury, I think being that's what the case law talks about
6 as long as they understand. It's almost like qualifying a
7 child as a witness, really; you know, the difference
8 between right and wrong, the truth and a lie.

9 THE COURT: Right. I'll do that that way. You
10 alert me to the other witnesses.

11 MR. BRASS: Okay. It will be the first couple on
12 his list.

13 THE COURT: Anything else we need to deal with
14 before we go out and --

15 MR. BRASS: What's our schedule going to be?

16 THE COURT: My schedule will be nine to five, at
17 least one break in the morning, one break in the afternoon.
18 We'll recess for lunch between 12 and 12:30, depending on
19 where we are with the witness. And we will break -- if we
20 recess at 12, we'll reconvene at 1:30. If we recess at
21 12:30, we'll reconvene at two.

22 MR. BRASS: Okay. Thank you.

23 THE COURT: Anything else we need to deal with?

24 MR. BURNS: Nothing from the state, Your Honor.

25 MR. BRASS: Nothing from the defendant either.